Supreme Court, U.S.
FILED
FEB 14 1991
OFFICE OF THE CLERK

90-1287

No. ____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

**BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, UNIVERSITY OF NORTH CAROLINA AT ASHEVILLE, THE NORTH CAROLINA SCHOOL OF THE ARTS,**
Petitioners,

V.

**UNITED STATES DEPARTMENT OF LABOR; ELIZABETH H. DOLE, SECRETARY OF LABOR; UNITED STATES OF AMERICA,**
Respondents.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

# Petition for Writ of Certiorari

LACY H. THORNBURG
Attorney General of North Carolina

Thomas J. Ziko
Special Deputy Attorney General

COUNSEL OF RECORD

N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387

Edwin M. Speas
Senior Deputy Attorney General

H. Jefferson Powell
Special Counsel to the Attorney General
ATTORNEYS FOR PETITIONERS

## QUESTION PRESENTED

DOES THE DEPARTMENT OF LABOR HAVE AUTHORITY TO ENFORCE PROVISIONS INCLUDED IN FEDERAL CONTRACTS PURSUANT TO SECTION 503 OF THE REHABILITATION ACT OF 1973, OR SECTION 402 OF THE VIETNAM ERA VETERANS READJUSTMENT ASSISTANCE ACT, OR EXECUTIVE ORDER 11246 AGAINST NORTH CAROLINA AGENCIES, INSTRUMENTALITIES, OR SUBDIVISIONS THAT HAVE NOT ENTERED INTO CONTRACTS WITH THE UNITED STATES AND DO NOT PARTICPATE IN WORK ON OR UNDER CONTRACTS BETWEEN THE UNITED STATES AND OTHER NORTH CAROLINA AGENCIES, INSTRUMENTALITIES, OR SUBDIVISIONS?

## PARTIES TO PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit were the Board of Governors of the University of North Carolina; the University of North Carolina at Asheville; the North Carolina School of the Arts; the United States Department of Labor; Elizabeth H. Dole, Secretary of Labor; and the United States of America. The following organizations participated as amici curiae: Women's Legal Defense Fund, American Association of University Women, Equal Rights Advocates, Mexican-American Legal Defense and Education Fund, Mexican-American Women's National Association, National Association of Commissions for Women, National Council of La Rasa, National Council of Negro Women, Inc., National Institute for Women of Color, National Organization for Women, Now Legal Defense and Education Fund, National Women's Law Center, National Women's Political Caucus, NC Equity, Northwest Women's Law Center, Organization of Pan Asian American Women, Inc., Wider Opportunities for Women, Women and Employment, Inc., Women Employed, Women's Law Project, YWCA of the USA, Equal Employment Advisory Council.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

PARTIES TO PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ..... ii

TABLE OF AUTHORITIES ..... vi

OPINIONS DELIVERED IN THE CASE ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE ..... 2

STATEMENT OF THE CASE ..... 3

REASONS WHY THE COURT SHOULD ALLOW THE WRIT. ..... 9

I. THE COURT OF APPEALS DISREGARDED THE ORDINARY AND OBVIOUS MEANING OF THE STATUTES AND ORDER, THEIR LEGISLATIVE HISTORY, AND THEIR OVERALL STRUCTURE AND THEREBY ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. ..... 9

II. THE COURT OF APPEALS ERRED WHEN IT PERMITTED THE ACTING SECRETARY TO DISREGARD THE REGULATIONS WHICH SPECIFICALLY PROVIDE THAT THE EQUAL OPPORTUNITY OBLIGATIONS INCLUDED IN FEDERAL CONTRACTS WITH GOVERNMENT AGENCIES "SHALL NOT BE APPLICABLE TO ANY AGENCY, INSTRUMENTALITY OR SUBDIVISION OF SUCH

GOVERNMENT WHICH DOES NOT PARTICIPATE IN WORK ON OR UNDER THE CONTRACT" AND THEREBY ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. .....15

III. THE COURT OF APPEALS ERRED WHEN, CONTRARY TO THE PLAIN LANGUAGE OF THE LAWS AND THE REASONABLE EXPECTATIONS OF STATE OFFICIALS, IT HELD THAT THE SECRETARY COULD IMPOSE CONTRACTUAL OBLIGATIONS ON CONSTITUENT INSTITUTIONS OF UNC WHICH HAVE NOT ENTERED INTO FEDERAL CONTRACTS AND THEREBY DECIDED A QUESTION OF FEDERAL LAW CONTRARY TO THE DECISIONS OF THIS COURT. .....19

CONCLUSION .....26

APPENDICES A-L .....1A-72A

Appendix A .....1A
Opinion of the United States Court of Appeals for the Fourth Circuit , October 26, 1990

Appendix B .....17A
United States Court of Appeals Order on Petition for Rehearing with Suggestionfor Rehearing In Banc, filed December 19, 1990

Appendix C .....20A
Judgment, United States District Court for the Eastern District of North Carolina dated September 15, 1989

Appendix D ..... 22A
Memorandum Opinion and Order, United States District Court for the Eastern District of North Carolina, dated September 13, 1990

Appendix E ..... 41A
U.S. Department of Labor's Decision and Final Administrative Order dated January 23, 1989

Appendix F ..... 53A
29 U.S.C. § 793

Appendix G ..... 54A
38 U.S.C. § 2012

Appendix H ..... 55A
Executive Order 11246

Appendix I ..... 58A
41 C.F.R. § 60-1.3

Appendix J ..... 59A
41 C.F.R. § 60-1.5(a)(4)

Appendix K ..... 60A
N.C. Gen. Stat. §§ 116-3, 116-4, 116-11(2), 116-11(5), 116-11(13), 116-33 and 116-34

Appendix L ..... 64A
The University of North Carolina's Administrative Memorandum Number 68 dated September 22, 1976 (revised 10/1/80)

## TABLE OF AUTHORITIES

*Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) ..... 23
*Burns v. Alcala*, 420 U.S. 575, 580 (1975) ..... 12
*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ..... 11, 12
*Courtney v. Remler*, 566 F. Supp. 1225 (D.S.C. 1983) aff'd 745 F.2d 50 (4th Cir. 1984) ..... 22
*DeMauro Construction Corp. v. United States*, 568 F.2d 1322 (Ct. Claims 1978) ..... 17
*Department of Transportation v. Paralyzed Veterans*, 477 U.S. 597 (1986) ..... 13
*General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982) ..... 22
*Grove City College v. Bell*, 465 U.S. 555 (1984) ..... 13, 18, 24
*Hofherr v. Dart Industries, Inc.*, 853 F.2d 259 (4th Cir. 1988) ..... 22
*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) ..... 12, 13
*INS v. Phinpathya*, 464 U.S. 183 (1984) ..... 12
*Jones v. Liberty Glass Co.*, 332 U.S. 524 (1947) ..... 12
*Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) ..... 20, 23, 25
*Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir.), cert. denied, 449 U.S. 88 (1980) ..... 12
*Sinking Fund Cases*, 99 U.S. 700 (1879) ..... 23
*South Dakota v. Dole*, 483 U.S. 203 (1987) ..... 19

*Southeastern Community College v. Davis*, 442 U.S. 397 (1979) ..... 11, 14, 15
*Teamsters v. Daniel*, 439 U.S. 551 (1979) ..... 11
*Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261 (1968) ..... 11

## STATUTES, EXECUTIVE ORDERS AND REGULATIONS

5 U.S.C. § 706 ..... 7
20 U.S.C. § 1687(2)(A) ..... 14
28 U.S.C. § 1254(1)(1988) ..... 2
29 U.S.C. § 794(b)(2)(A) ..... 14
41 C.F.R. 60-1.3 ..... 16
41 C.F.R. 60-1.5(a)(4) ..... 17, 20
41 C.F.R. 60-250.2 ..... 16
41 C.F.R. 60-250.3(a)(4) ..... 17
41 C.F.R. 60-741.2 ..... 16
41 C.F.R. 60-741.3(a)(4) ..... 17
Section 202 of Executive Order 11246, 3 C.F.R. 339 (1965), as amended by Executive Order 11375, 3 C.F.R. 684 (1967) ..... 3, *in passim*
Section 402 of the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 2012 (1982) ..... 3, *in passim*
Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (Supp. V. 1982) ..... 3, *in passim*
Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ..... 13, 14, 15
The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 (1987) ..... 14
Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ..... 13
§ 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) ..... 18

N.C. Gen. Stat. § 116-3 .....4
N.C. Gen. Stat. § 116-4 .....3, 4
N.C. Gen. Stat. § 116-11(2) .....3
N.C. Gen. Stat. § 116-11(13) .....4
N.C. Gen. Stat. § 116-14(a) .....3
N.C. Gen. Stat. § 116-33 .....4
N.C. Gen. Stat. § 116-34 .....4

## MISCELLANEOUS

S. REP. No. 93-318, 93rd Cong.,
1st Sess., reprinted in 1973 U.S.
CODE CONG. & AD. NEWS 2076, 2123 .....13, 19
RESTATEMENT (SECOND) OF
AGENCY § 1 (1958) .....22

No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1990**

**BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, UNIVERSITY OF NORTH CAROLINA AT ASHEVILLE, THE NORTH CAROLINA SCHOOL OF THE ARTS,**
Petitioners,

V.

**UNITED STATES DEPARTMENT OF LABOR; ELIZABETH H. DOLE, SECRETARY OF LABOR; UNITED STATES OF AMERICA,**
Respondents.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

Petitioners, Board of Governors of the University of North Carolina, University of North Carolina at Asheville, and North Carolina School of the Arts, petition for writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on October 26, 1990.

## OPINIONS DELIVERED IN THE CASE

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is reported at 917 F.2d 812 (4th Cir. 1990) and is reprinted in the Appendix to this petition. (App. 1A). The Order and Memorandum Opinion of the United States District Court for the Eastern District of North Carolina filed on

September 15, 1989 is reported at 722 F. Supp. 1301 (E.D.N.C. 1989) and is reprinted in the Appendix. (App. 22A). The Decision and Final Administrative Order of the Acting Secretary of the Department of Labor issued on January 23, 1989, is reprinted in the Appendix. (App. 41A).

## JURISDICTION

The Fourth Circuit Court of Appeals entered its judgment in this case on October 26, 1990. (App. 2A). On December 19, 1990, the Fourth Circuit Court of Appeals denied the Board of Governors of the University of North Carolina's, University of North Carolina at Asheville's, and North School of the Arts' petition for rehearing and suggest for rehearing in banc. (App. 17A). The petitioners believe that 28 U.S.C. § 1254(1)(1988) confers jurisdiction on the Court to review the October 26, 1990, judgment of the Fourth Circuit Court of Appeals.

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE

1. Executive Order 11246, Section 202, 3 C.F.R. 339 (1965), as amended by Executive Order 11375, 3 C.F.R. 684 (1967) and Executive Order 12086, 3 C.F.R. 230 (1978), *reprinted in* 42 U.S.C. §2000(e)(1982). (App. 55A-57A)

2. Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (Supp. V. 1982). (App. 53A)

3. Section 402 of the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 2012 (1982). (App. 54A).

4. N.C. Gen. Stat. § 116-3. (App. 60A-61A).

5. N.C. Gen. Stat. § 116-11(13). (App. 62A).

## STATEMENT OF THE CASE

This case involves the extent of the Secretary of the Department of Labor's (hereinafter the "Secretary") jurisdiction to enforce Section 202 of Executive Order 11246, 3 C.F.R. 339 (1965), as amended by Executive Order 11375, 3 C.F.R. 684 (1967) and Executive Order 12086, 3 C.F.R. 230 (1978), *reprinted in* 42 U.S.C. §2000(e)(1982) (hereinafter "Executive Order"), Section 402 of the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 2012 (1982), (hereinafter the "VEVRAA"), Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (Supp. V. 1982), (hereinafter the "Rehab Act"). In particular, this case presents the question of whether the Executive Order, the VEVRAA or the Rehab Act grant the Secretary authority to demand access to the affirmative action plans and employment records of constituent institutions of the University of North Carolina which have not entered into contracts with any federal agency.

The Board of Governors of the University of North Carolina, which is also known as the University of North Carolina (UNC), is an agency of the State of North Carolina composed of sixteen statutorily recognized constituent institutions. N.C. Gen. Stat. § 116-4; (App. 61A). The University of North Carolina at Asheville (UNC-A) and the North Carolina School of the Arts (NCSA) are two of those sixteen constituent institutions. The Board of Governors is responsible for the general determination, control, supervision and management of the affairs of the constituent institutions. N.C. Gen. Stat. § 116-11(2); (App.61A ). The chief administrative officer of UNC is the President of the University of North Carolina. N.C. Gen. Stat. § 116-14(a). The particular affairs of each constituent institution, however, are governed by its chancellor, who is the administrative and executive head of the constituent institution, and a board of trustees which advises the Board of Governors and the chancellor and

exercises those powers and duties delegated to it by the Board of Governors. N.C. Gen. Stat. § 116-33, and § 116-34; (App 62A-63A. ).

The North Carolina General Assembly has granted the Board of Governors broad corporate powers to administer the system of higher education in North Carolina. N.C. Gen. Stat. § 116-3; (App. 60A). The Board of Governors, however, is not obligated to exercise those powers directly. N.C. Gen. Stat. § 116-11(13) specifically authorizes the Board of Governors to delegate any part of its authority over the affairs of the constituent institutions to the boards of trustees of the constituent institutions, or through the President of UNC, to the chancellors of the constituent institutions. (App. 62A).

Pursuant to their authority under N.C. Gen. Stat. § 116-11(13), the Board of Governors and the President have delegated to the sixteen individual constituent institutions the authority to enter into contracts in their own name without the prior approval of the Board of Governors or the President. (App. 27A and 64A-72A). Eleven of the constituent institutions have exercised their independent power to enter into contracts in their own names with federal agencies without prior approval from the Board of Governors or the President. (App. 5A, 27A and 45A). All those contracts are between a constituent institution in its own name and a federal agency in its own name. The other five constituent institutions, however, have not exercised their power to make contracts with the United States or any of its agencies. (App. 5A and 27A). UNC-A and NCSA are among the institutions which have never contracted with a federal agency. In addition, the Board of Governors itself is not party to any contract with the United States or any of its agencies. (App. 28A).

The Secretary administers the federal laws in question. These laws require all federal contracts for payments above a

certain amount to include provisions which require the contracting party to agreement to comply with certain equal employment or affirmative action requirements. For example, Section 503 of the Rehab Act provides, in pertinent part, that:

> Any contract in excess of $2,500.00 entered into by any federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals . . . .

(App. 53A)(emphasis added).

Section 402 of the VEVRAA contains language very similar to the Rehab Act. It provides, in pertinent part, that:

> Any contract in the amount of $10,000.00 or more entered into by any department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.

(App. 54A) (emphasis added).

Section 202 of Executive Order 11246 provides, in pertinent part, that all federal contracting agencies shall include in every government contract provisions that:

> During the performance of this contract, the contractor agrees as follows:

> (1) *The contractor will not discriminate* against any employee or applicant for employment because of race, color, religion, sex, or national origin. *The contractor will take affirmative action* to ensure that applicants are employed, and the employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

(App. 55a) (emphasis added).

In 1981, the Office of Federal Contract Compliance Programs (OFCCP), the division of the Department assigned responsibility for enforcing the Rehab Act, the VEVRAA and Executive Order 11246, demanded that UNC-A and NCSA provide documentation establishing that their campuses were in compliance with these acts. UNC-A and NCSA, however, insisted that they were not parties to any contracts with any federal agencies and that the OFCCP did not have authority to demand copies of UNC-A's or NCSA's affirmative action plans or supporting employment data. Therefore, UNC-A and NCSA refused to comply voluntarily with OFCCP's demands.

In 1984, the OFCCP filed an administrative complaint against the UNC regarding UNC-A's and NCSA's 1981 refusal to submit to its reviews. The administrative process culminated five years later with the Department's January 23, 1989, decision. (App. 41A). In that decision, Dennis S. Whitfield, Acting Secretary of Labor, found that "the University of North Carolina is, by definition, one agency, not sixteen separate independent agencies." (App. 45A). Relying on that finding, the Acting Secretary held that UNC-A and NCSA are only parts of UNC and, therefore, were subject to the OFCCP investigations by virtue of the contracts between federal agencies and other UNC constituent institutions. (App. 46A).

In due course, UNC, UNC-A and NCSA filed a complaint in the United States District Court for the Eastern District of North Carolina. In their complaint, UNC-A and NCSA alleged that the Acting Secretary's decision deprived them of their rights under the Tenth Amendment to the United States Constitution, exceeded the Department's authority in violation of 5 U.S.C. § 706 and was arbitrary and capricious in violation of 5 U.S.C. § 706. (App. 28A ).

After reviewing the administrative record and considering the arguments of the parties, Judge W. Earl Britt held that the Acting Secretary erred when he decided that, although UNC-A and NCSA had never contracted with a federal agency, they were nonetheless subject to the OFCCP's jurisdiction because other UNC constituent institutions had contracted with federal agencies. In the opinion of Judge Britt:

> Defendants seek to complicate an otherwise simple task. A 'contractor' is, as the defendants' regulations state, a 'person' who has a government contract, nothing more, nothing less.
>
> If the President and Congress had intended the contract compliance laws to embrace all institutions of higher learning in a state when one of the institutions entered into a government contract it would have been easy enough to so provide. It is not the province of the court, or the Department of Labor, to place expansive and strained construction on simple words to accomplish such a result.

(App. 37A-38A). Judge Britt, therefore, held that the decision of the Acting Secretary was not in accordance with law and granted the plaintiffs their requested relief. The Secretary appealed to the Court of Appeals for the Fourth Circuit.

A divided panel of the Court of Appeals for the Fourth Circuit reversed the district court and held that, even though the statutes and order limit equal employment and affirmative action duties to "the party contracting with the United States" or to the "contractor," the Secretary could impose those contractual obligations on UNC constituent institutions which do not hold government contracts.

In the opinion of the Court of Appeals, the determinative issue was the state statutory scheme under which UNC and its constituent institutions were organized. (App. 3A, 9A and 12A). Relying on its interpretation of North Carolina statutes, the Court of Appeals held that UNC was a single state agency, not sixteen separate, independent agencies. (App. 9A). The Court of Appeals acknowledged that the Board of Governors had legally delegated the authority to enter certain contracts, including those at issue in this case, to the individual constituent institutions. (App. 10A) The Court of Appeals, however, held that this delegation of authority was ineffective because the Board of Governors retained the authority to rescind that delegation at any time. Moreover, the Court of Appeals noted that under the terms of the Administrative Memorandum describing the delegation of contracting authority the President "may at any time direct the withdrawal, revision, or amendment of an application or proposal forwarded . . . ." (App. 9A-10A).

Relying on those determinations, the Court of Appeals ultimately held:

> [T]he Acting Secretary of Labor was correct in concluding that the UNC system was a single state agency of which the complaining campuses are merely parts and that the noncontracting campuses therefore fell within the OFCCP's review jurisdiction. Although eleven of UNC's sixteen campuses have, in their own

> names, bid for and received federal contracts, they have done so subject to the power of review that UNC's Board of Governors and President have retained over their actions. In ruling that the campuses that had entered federal contracts had done so as agents of UNC, the Acting Secretary merely stated what clearly appears from an examination of the relevant North Carolina statutes.

(App. 12A).

The petitioners thereafter filed a petition for rehearing and suggestion of rehearing in banc. By a five to five vote, with Judge Dickson Phillips disqualified, the Court of Appeals decided not to rehear the case. (App. 17A-19A).

## REASONS WHY THE COURT SHOULD ALLOW THE WRIT.

### I. THE COURT OF APPEALS DISREGARDED THE ORDINARY AND OBVIOUS MEANING OF THE STATUTES AND ORDER, THEIR LEGISLATIVE HISTORY, AND THEIR OVERALL STRUCTURE AND THEREBY ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This petition pertains to the construction and application of the Rehab Act, the VEVRAA and Executive Order 11246 in the context of contracts between the federal government and state agencies, instrumentalities or subdivisions. None of the petitioning state agencies has ever entered into a contract with any federal agency. (App. 5A, 27A-28A). This petition raises the issue of whether, despite that fact, the Board of Governors or UNC-A or NCSA is "a party contracting with the United States" or "contractor" with the United States as those terms are used in

§ 503 of the Rehab Act, § 402 of the VEVRAA and § 202 of Executive Order 11246. The petitioners believe the plain language of those laws prohibits a finding that any of them is "a party contracting with the United States" or a "contractor" with the United States and, therefore, they are not subject to the statutes' and order's equal employment and affirmative action obligations or the Acting Secretary's jurisdiction. The Court of Appeals' decision to affirm the Acting Secretary's efforts to extent the coverage of these laws to the petitioners is incompatible with congressional and presidential intent as unambiguously expressed in these laws. Therefore, the Court should grant this petition to settle this important issue of federal law and correct the Court of Appeals' erroneous interpretation and application of the statutes and the order.

The standard for reviewing administrative decisions related to the construction and interpretation of statutes is well established.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

***Chevron U.S.A. v. Natural Resources Defense Council***, 467 U.S. 837, 842-43 (1984). This two step review is the necessary product of the separation of powers which lies at the heart of the Constitution. Congress has all legislative authority and its "intention is the law and must be given effect." *Id.* at 843 n.9.

When congressional intent is not clear, an agency's interpretations of the statutes that it oversees are entitled to some deference. But the deference due an agency interpretation "is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history." ***Southeastern Community College v. Davis***, 442 U.S. 397, 411 (1979), (*quoting* ***Teamsters v. Daniel***, 439 U.S. 551, 566 n.20 (1979)).

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a reasonable basis in law. But the courts are the final authorities on issues of statutory construction and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia.

***Volkswagenwerk v. Federal Maritime Commission***, 390 U.S. 261, 272 (1968) (citations omitted).

All three of the laws at issue clearly state that their equal employment or affirmative action requirements are to be enforced only through contractual provisions with parties that agree to contracts with the United States. The Rehab Act and the VEVRAA expressly state that it is "the party contracting with the United States" that assumes responsibility for taking affirmative

action to employ and advance handicapped individuals and Vietnam veterans. 38 U.S.C. § 2012(a) and 29 U.S.C. § 793(a). Executive Order 11246, sec. 202, expressly limits its equal employment and affirmative action duties to the government "contractor."

If, after "employing the traditional tools of statutory construction," ***Chevron U.S.A. v. Natural Resources Defense Council***, 467 U.S. at 843 n.9, a court determines that Congress and the President did not intend to impose equal employment and affirmative action obligations on parties who have not signed contracts with the United States, then that intent is the law and must be given effect.

When confronting undefined terms, the first rule of statutory construction is that ordinary words be given ordinary meanings. ***Burns v. Alcala***, 420 U.S. 575, 580-81 (1975). "In the absence of some contrary indication, we must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language they used." ***Jones v. Liberty Glass Co.***, 332 U.S. 524, 531 (1947). The Court is "bound to 'assume that the legislative purpose is expressed by the ordinary meaning of the words used.'" ***INS v. Cardoza-Fonseca***, 480 U.S. 421, 431 (1987) (*quoting*, ***INS v. Phinpathya***, 464 U.S. 183, 189 (1984).

The terms at issue in this case, "contractor" and "party contracting," are "remarkably plain and jargon-free." ***Rogers v. Frito-Lay, Inc.***, 611 F.2d 1074, 1079 (5th Cir.) (describing § 503 of the Rehab Act), *cert. denied*, 449 U.S. 889 (1980). To both the lawyer and the layman they mean one thing, *i.e.*, the person or entity who agrees to perform the tasks required under the contract. These terms cannot reasonably be read to include any person or entity which has not agreed to accept the benefits of and be bound by the terms of a contract with the United States.

Plainer expressions of congressional and presidential intent can hardly be imagined. The legislative history of the Rehab Act demonstrates that in using those terms Congress intended only to require affirmative action from "any contractor who seeks to contract with the Federal Government." S. REP. No. 93-318, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2123. The use of particular, limiting language to describe the scope of the affirmative action requirements of the Rehab Act, the VEVRAA and Executive Order 11246 ("party contracting with the United States" and "contractor")--language not found in the equal employment provisions of the Rehab Act and similar laws--is also clear evidence of the legislative intent. ***Cf., INS v. Cardoza-Fonseca***, 480 U.S. at 432 (where particular language is included in one section of an act but omitted in another section, it is"presumed that Congress act[ed] intentionally or purposely.") The Court of Appeals' decision in this case does not comport with this plain congressional and presidential intent.

The Acting Secretary's arguments for expanding the scope of these laws to cover state institutions of higher education which have not entered into government contracts are based on arguments similar to those which this Court rejected when it refused to give an expansive interpretation to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. Both of those statutes ban discrimination in "any program or activity receiving federal funds." In ***Grove City College v. Bell***, 465 U.S. 555 (1984), the Supreme Court held that the language in Title IX prohibiting sex discrimination in "any education program or activity receiving federal financial assistance" did not permit federal agencies to regulate an entire college when only the financial aid program received federal financial assistance. In ***Department of Transportation v. Paralyzed Veterans***, 477 U.S.

597 (1986), the Supreme Court held that the language in Section 504 of the Rehab Act prohibiting discrimination against handicapped persons "in any program or activity receiving federal financial assistance" did not require airlines that used airports that receive federal funds to comply with federal regulations applicable to recipient airports. Finally, in ***Southeastern Community College v. Davis***, 442 U.S. 397 (1979), a unanimous Court rebuffed the Secretary of Health, Education and Welfare's efforts to enforce § 504 of the Rehab Act to force affirmative action obligations on "program[s] and activit[ies] receiving Federal financial assistance" on the ground that such regulations "would constitute an unauthorized extension of the [equal employment] obligations imposed by that statute." *Id.* at 410.

The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 (1987), subsequently amended those statutes to specifically provide that in the context of higher education the term "program or activity" means all of the operations of a college or university, or other postsecondary institution, or a public system of higher education. 20 U.S.C. § 1687(2)(A); and 29 U.S.C. § 794(b)(2)(A). Notably, Congress did not feel compelled to alter the scope of § 503 of the Rehab Act, § 402 of the VEVRAA or § 202 of Executive Order 11246 to include state agencies, instrumentalities or subdivisions which do not hold government contracts in their own names.

The Acting Secretary's efforts to extend the coverage of these laws and his jurisdiction to state agencies which do not come within the plain meaning of the statutes and order will have a significant impact on many state institutions and agencies. At the very least, the decision to permit the Secretary to enforce these laws against noncontracting state institutions endangers future contractual relations between the Secretary and state institutions. If the Court of Appeals' decision is not reversed, state agencies that are contemplating contracts with federal agencies may decide

it is not prudent to undertake the substantial obligations and investments of time and money essential to performing under those contracts when the Secretary could deny them the benefits of their bargain on grounds that an independent state agency failed to meet the Department's affirmative action goals.

Moreover, the lower court decision places the Secretary in the position to force constituent institutions with no federal contracts to assume costly affirmative action obligations under threat of cutting off millions of dollars in contracts to other constituent institutions. At best, the lower court decision permits the Secretary to impose the burdensome provision of federal contracts on institutions which are not receiving the benefits of those contracts. At worst, the Court of Appeals' decision places competing researchers employed at noncontracting institutions in the position to disrupt the payment of funds to reseachers employed by contracting institutions which are in complete compliance with the statutes and the order.

Because of the important role that federal contracts play in research at this nation's public colleges and universities, the Court should grant this petition in order settle an important issue of federal law which, left unchanged, will expose those state institutions which have entered into federal contracts to costly sanctions as a result of the conduct of separate but related institutions that are not parties to any federal contracts. *See,* ***Southeastern Community College v. Davis,*** 442 U.S. 397, 404 (1979)(wherein the Court granted the petition for writ of certiorari to settle an issue regarding the scope of § 504 of the Rehab Act because of the importance it had to many institutions of higher education).

## II. THE COURT OF APPEALS ERRED WHEN IT PERMITTED THE ACTING SECRETARY TO DISREGARD THE REGULATIONS WHICH SPECIFICALLY PROVIDE THAT THE EQUAL

**FEDERAL CONTRACTS WITH GOVERNMENT AGENCIES "SHALL NOT BE APPLICABLE TO ANY AGENCY, INSTRUMENTALITY OR SUBDIVISION OF SUCH GOVERNMENT WHICH DOES NOT PARTICIPATE IN WORK ON OR UNDER THE CONTRACT" AND THEREBY ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.**

Even if the language of the statutes and order were not plain, the Court of Appeals' decision to extend the coverage of these laws to constituent institutions which do not have contracts with the federal government is contrary to the Department's own regulations. By permitting the Acting Secretary to expand his jurisdiction contrary to his own regulations, the Court of Appeals has decided an important issue of federal law which has not been, but should be, decided by this Court.

The Department is charged with the responsibility of promulgating regulations providing for the enforcement of the Rehab Act, the VEVRAA, and Executive Order 11246.[1]

Pursuant to that authority the Department has elected to define several terms applicable to this case. A "contractor" is defined as "a prime contractor or subcontractor." (App. 58A). A "prime contractor" is defined as "any person holding a contract."

---

1 The definitions applicable to Executive Order 11246 are reported at 41 C.F.R. 60-1.3; definitions applicable to the VEVRAA are reported at 41 C.F.R. 60-250.2; and the definitions applicable to the Rehab Act are reported at 41 C.F.R. 60-741.2. The definitions are virtually identical. The relevant definitions from 41 C.F.R. 60-1.3 are reprinted at App. 58A.

"prime contractor" is defined as "any person holding a contract." (App. 58A). A "contract" is defined as "any Government contract or any federally assisted contract." (App. 58A). A "government contract" is defined as "any agreement or modification thereof between any contracting agency and any person." (App. 58A). A "person" is defined as "any natural person, corporation, partnership, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government." (App. 58A). These regulations were drafted against the backdrop of general government contract law, which defines the parties to the contract as those parties who sign the contract form and agree to perform under it. *E.g.*, ***DeMauro Construction Corp. v. United States***, 568 F.2d 1322, 1326 (Ct. Claims 1978).

The Department has also promulgated regulations which specifically define the coverage of the Rehab Act, the VEVRAA and Executive Order 11246 in those cases where a federal agency has contracted with an agency, instrumentality or subdivision of a state: The regulation for the Rehab Act states:

> The requirements of the affirmative action clause in any contract or subcontract with a state or local government (or any agency, instrumentality or subdivision or thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

41 C.F.R. 60-741.3(a)(4); (App. 59A). The VEVRAA regulation, 41 C.F.R. 60-250.3(a)(4), is identical. The regulation for Executive Oroder 1246, 41 C.F.R. 60-1.5(a)(4), substitutes the phrase "equal opportunity" for "affirmative action."

These regulations clearly support the petitioners' position in this case. First, the regulations expressly recognize that the states may delegate the authority to contract to individual state

agencies, subdivisions or instrumentalities. Second, the regulations expressly provide that an entire state is not subject to coverage under these laws simply because a single agency or instrumentality or subdivision of the state has signed a contract with a federal agency. Finally, the regulations expressly provide that separate state agencies, subdivisions or instrumentalities are not subject to coverage under these laws unless they themselves hold a contract with a federal agency or participate in work on or under a government contract.

These regulations demonstrate that the Department itself has expressed the intent to recognize the hierarchical structure of state government and respect the states' right to structure their governments as they see fit. When considered in their entirety, the Department's regulations plainly express an intent to permit individual units of state government to enter into federal contracts without subjecting all related units or, indeed, the entire state government to the obligations which these laws require of government contractors. In this case, neither the Board of Governors, nor UNC-A nor NCSA holds a government contract or participates in work on or under any contract held by any other constituent institution. In light of those facts, the Acting Secretary's attempt to extend the coverage of the affirmative action clauses in its contracts with the contracting constituent institutions to UNC-A and NCSA is contrary to the Department's own regulations.

Therefore, the Court should grant this petition to settle this important question of federal law regarding the scope of the contractual provisions required under Rehab Act, the VEVRAA or Executive Order 11246. *See*, ***Grove City College v. Bell,*** 465 U.S. 555 (1984) (wherein the Court granted certiorari to settle questions concerning the scope and operation of the provisions and regulations of § 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which prohibits sex

discrimination in "any education program of activity receiving federal financial assistance.").

## III. THE COURT OF APPEALS ERRED WHEN, CONTRARY TO THE PLAIN LANGUAGE OF THE LAWS AND THE REASONABLE EXPECTATIONS OF STATE OFFICIALS, IT HELD THAT THE SECRETARY COULD IMPOSE CONTRACTUAL OBLIGATIONS ON CONSTITUENT INSTITUTIONS OF UNC WHICH HAVE NOT ENTERED INTO FEDERAL CONTRACTS AND THEREBY DECIDED A QUESTION OF FEDERAL LAW CONTRARY TO THE DECISIONS OF THIS COURT.

In enacting § 503 of the Rehab Act and § 402 of the VEVRAA, Congress relied on its spending powers to impose equal employment or affirmative action obligations on "any contractor who seeks to contract with the Federal Government." S. REP. No. 93-318, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2123 (Senate report on the Rehabilitation Act of 1973). This Court has held that when Congress exercises its spending power in relation to the states it must precisely and unambiguously specify the conditions imposed upon the states as a consequence of acceptance of the offered funds. In ***South Dakota v. Dole***, 483 U.S. 203 (1987) the Court described Congress' obligations as follows:

> The spending power is of course not unlimited . . . , but is instead subject to several general restrictions articulated in our cases . . . [including the requirement] that if Congress desires to condition the States' receipt of funds it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."

Id. at 207, (*quoting* ***Pennhurst State School and Hospital v. Halderman***, 451 U.S. 1, 17 (1981).

The Court has explained that Congress must use plain and unambiguous language when exercising its spending powers because:

> Legislation enacted pursuant to the spending power is much in the nature of a contract . . . . The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of participation.

***Pennhurst State School and Hospital v. Halderman***, 451 U.S. 1, 17 (1981) (citations omitted).

As noted above, the plain language of the statutes and the order limits their affirmative action obligations to parties that contract with federal agencies. Moreover, the Department's own regulations plainly state that the contractual obligations assumed by one state agency, instrumentality or subdivision are not applicable to other agencies, instrumentalities or subdivisions which do not participate in work on or under the contract. *E.g.*, 41 C.F.R. 60-1.5(a)(4); (App. 59A). Despite that plain language, the Court of Appeals' decision permits the Acting Secretary to extend his jurisdiction to state agencies which have never entered into any contracts with the federal government and have never participated in work on or under any federal contracts. Therefore,

court decision not only holds the noncontracting and nonparticipating institutions responsible for contractual obligations they did not agree to assume but also imposes those obligations on the noncontracting institutions despite the Department's representations that they would not be required to shoulder those burdens. Such a result is clearly inconsistent with the holdings of ***South Dakota v. Dole*** and ***Pennhurst State School and Hospital v. Halderman*** that Congress exercise its spending powers in plain and unambiguous terms.

The Court of Appeals did not address the holdings of ***South Dakota v. Dole*** and ***Pennhurst State School and Hospital v. Halderman***. Instead, the Court of Appeals avoided the issue by holding that under the North Carolina statutes UNC is a single state agency. In the Court of Appeals' opinion, the fact that UNC is a single state agency necessarily means that the constituent institutions that have entered into contracts with the federal government did so as agents for UNC. (App. 13A). Therefore, the Court of Appeals imposed all the contractual obligations of the contracting institutions on the Board of Governors and through the Board of Governors to UNC-A and NCSA. By this means, UNC-A and NCSA, two constituent institutions that had never entered into contracts with the federal government were held to be "part[ies] contracting with the United States" or government "contractor[s]" subject to the affirmative action or equal employment provisions of contracts to which they never agreed.

The Court of Appeals' determination that those constituent institutions that have contracted with federal agencies did so as agents for UNC is contrary to the facts and the principles of the law of agency. Therefore, it is inconsistent with this Court's holdings in ***South Dakota v. Dole*** and ***Pennhurst State School and Hospital v. Halderman***.

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." RESTATEMENT (SECOND) OF AGENCY § 1 (1958). The mutual consent of the parties is the core of any agency relationship. ***General Building Contractors v. Pennsylvania***, 458 U.S. 375, 393 (1982). Once the parties have each given their consent, the principal is bound by the authorized actions of its agent. But if the parties do not give their mutual consent, no agency relation arises and the putative principal is not bound by the actions of the alleged agent. ***Hofherr v. Dart Industries, Inc.***, 853 F.2d 259 (4th Cir. 1988); ***Courtney v. Remler***, 566 F. Supp. 1225, 1230 (D.S.C. 1983) *aff'd* 745 F.2d 50 (4th Cir. 1984).

There is no evidence in the record that the Board of Governors has ever authorized any constituent institution to obligate UNC to perform any obligations under any contract. Nor is there any evidence that the Board of Governors retained control over the manner in which the constituent institutions performed their contracts with the federal agencies. Even when employing senior administrators, the constituent institutions exercise substantial independence, with the Board of Governors' authority limited to approving or rejecting the recommendations of the chancellors. (App. 62A).

The evidence in the record shows that the constituent institutions do not contract as agents of the Board of Governors. The Board of Governor's policy indicates that the constituent institutions are not authorized to sign contracts which will impose obligations on the Board of Governors. (App. 66A-67A). In fact, the Board of Governors policy expressly limits the constituent institution's right to enter into contracts that impose obligations on the Board of Governors. For example, the Board of

Governor's policy prohibits constituent institutions from entering into contracts without express approval when those contracts require the constituent institution to provide matching funds or contributions that cannot be provided from the institution's current financial resources. (App. 67A).

There is no evidence that the Board of Governors and the constituent institutions ever agreed that the constituent institutions could enter into contracts on behalf of the Board of Governors or any other constituent institution. All the evidence shows is that the Board of Governors has delegated to the constituent institutions the authority to enter into contracts in their own names without prior approval from the Board. The fact that the President and Board of Governors of UNC retain the authority to rescind that delegation of authority does not distinguish this delegation from any other delegation of authority. The legislative branch of government always retains the inherent authority to withdraw authority to contract on behalf of the government and to rescind or modify any contract which has not yet ripened into vested rights. *E.g.*, ***Sinking Fund Cases***, 99 U.S. 700,720 (1879); ***Bowen v. Agencies Opposed to Social Security Entrapment***, 477 U.S. 41, 52 (1986). If the North Carolina General Assembly retains the power to withdraw any powers conferred on the Board of Governors, the mere fact that the Board of Governors retains the power to revoke its further delegation of that authority to the constituent institutions cannot convert the constituent institutions into agents for the Board of Governors. If the power to rescind the delegation of authority creates a principal-agent relationship, then the Secretary could follow the delegation of authority from the Board of Governors to the North Carolina General Assembly and thereby impose the obligations of a single contract on the entire North Carolina government. Surely this is contrary to congressional and presidential intent as expressed in the Rehab Act, the VEVRAA and Executive Order 11246.

In any event, the fact that the President of UNC retains the authority to disapprove a constituent institution's contract proposal does not mean that the proposals which are not disapproved become the contracts of the Board of Governors. The Board of Governors does not control the personnel who perform the contracts and does not receive payment for the contracts from the federal government. Moreover, the contracting federal agencies would be certain to object if the Board of Governors decided to shift the performance of the contract from one constituent institution to another. Therefore, the record does not support the Court of Appeals' determination that the constituent institutions that have signed contracts with federal agencies did so as agents of and on behalf of the Board of Governors.

The Court of Appeals' analysis of the case also has the anomalous effect of making the scope of federal equal employment and affirmative action laws dependent on the idiosyncrasies of state law. Under the Court of Appeals' analysis, North Carolina may limit the Secretary's jurisdiction by enacting legislation specifically authorizing each constituent institution to enter into contracts with federal agencies. The Board of Governors could also effectively reverse the Court of Appeals decision simply by amending its administrative procedures to eliminate any semblance of control over the constituent institution's authority to contract. The lower court's decision to rely on the minutiae of state law, rather than to address the practical considerations of whether a particular institution agreed to perform and assume the obligations of the federal contract, will produce inconsistent enforcement of civil rights legislation. *Cf.*, ***Grove City College v. Bell***, 465 U.S. 555, 572 (1984) ("Grove City's choice of administrative mechanisms, we hold, neither expands nor contracts the breadth" of its activities subject to equal employment laws).

Irrespective of the exact relation between the Board of Governors and the constituent institutions under North Carolina law, the record in this case shows that the constituent institutions which have contracted with federal agencies did so in their own names. (App. 5A and 27A-28A). Neither the Rehab Act, nor the VEVRAA, nor Executive Order 11246, nor the regulations promulgated under those laws plainly and unambiguously state that the contractual obligations assumed by one state agency, instrumentality or subdivision will be imputed to any other state agency, instrumentality or subdivision. In fact, the plain language of the statutes, the order and the regulations indicate that the contractual provisions included to satisfy the laws' equal employment and affirmative action requirements will be limited to the agency, instrumentality or subdivision that entered into and agreed to perform under the contract.

Given the language of the statutes, order and regulations, neither the Board of Governors, nor UNC-A nor NCSA could not have been aware that they were bound by the affirmative action or equal employment clauses of the contracts signed by single constituent institutions. Therefore, this state agencies could not have "voluntarily and knowingly," ***Pennhurst State School and Hospital v. Halderman***, 451 U.S. at 17, accepted the terms of those contracts. The unavoidable effect of the lower court decision is to impose contractual obligations on state agencies which have never indicated their agreement to accept those obligations and are not the recipients of the federal funding. Therefore, the Court of Appeals' decision conflicts with the holding of ***South Dakota v. Dole*** and ***Pennhurst State School and Hospital v. Halderman*** and the Court should grant this petition in order to correct that error.

## CONCLUSION

For the reasons stated, the petitioners believe that the Court of Appeals' decision conflicts with decisions of this Court and that the case presents an important federal question which has not been, but should be, decided by this Court. Therefore, the Court should issue the writ in order to settle the important federal questions presented and correct the Court of Appeals' decision.

Respectfully submitted this the 8th day of February 1991.

LACY H. THORNBURG
Attorney General of North Carolina

Thomas J. Ziko
Special Deputy Attorney General
COUNSEL OF RECORD

N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387

Edwin M. Speas
Senior Deputy Attorney General

H. Jefferson Powell
Special Counsel to the Attorney General
ATTORNEYS FOR PETITIONERS

APPENDICES A - L

# APPENDIX A

## UNITED STATES COURT OF APPEALS

### FOR THE FOURTH CIRCUIT

---

No. 89-3359

---

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; UNIVERSITY OF NORTH CAROLINA, at Asheville; THE NORTH CAROLINA SCHOOL OF THE ARTS,

Plaintiffs - Appellees,

versus

UNITED STATES DEPARTMENT OF LABOR; ELIZABETH H. DOLE, SECRETARY OF LABOR; UNITED STATES OF AMERICA,

Defendants - Appellants,

WOMEN'S LEGAL DEFENSE FUND; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; EQUAL RIGHTS ADVOCATES; MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND; MEXICAN-AMERICAN WOMEN'S NATIONAL ASSOCIATION; NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN; NATIONAL COUNCIL OF LA RAZA; NATIONAL COUNCIL OF NEGRO WOMEN, INCORPORATED; NATIONAL INSTITUTE FOR WOMEN OF COLOR; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL WOMEN'S LAW CENTER; NATIONAL WOMEN'S POLITICAL CAUCUS; NC EQUITY; NORTHWEST WOMEN'S LAW CENTER; ORGANIZATION OF PAN ASIAN AMERICAN WOMEN, INCORPORATED; WIDER OPPORTUNITIES FOR WOMEN; WOMEN AND EMPLOYMENT, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; YWCA OF THE USA; EQUAL EMPLOYMENT ADVISORY COUNCIL,

Amici Curiae.

---

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge. (CA-89-242-5-CIV-B)

---

Argued: June 6, 1990 Decided: October 26, 1990

---

Before WIDENER and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

---

Reversed by published opinion. Judge Chapman wrote the opinion, in which Senior Judge Butzner joined. Judge Widener wrote a dissenting opinion.

---

**ARGUED**: Irving Gornstein, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Thomas J. Ziko, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** James P. Turner, Acting Assistant Attorney General, David K. Flynn, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Robert P. Davis, Solicitor, James D. Henry, Associate Solicitor, Joseph M. Woodward, Deputy Associate Solicitor, Diane A. Heim, Counsel for Litigation, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Appellants. Lacy H. Thornburg, Attorney General, Edwin M. Speas, Jr., Senior Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. Gregg H. Levy, T. Jeremy Gunn, COVINGTON & BURLING, Washington, D.C.; Claudia Withers, Donna Lenhoff, WOMEN'S LEGAL DEFENSE FUND, Washington, D.C., for Amici Curiae The Women's Legal Defense Fund, American Association of University Women, Equal Rights Advocates, Mexican-American Legal Defense and Education Fund, Mexican-American Women's National Association, National Association of Commissions for Women, National Council of La Raza, National Council of Negro Women, Inc., National Institute for Women of Color, National Organization for Women, NOW Legal Defense and Education Fund, National Women's Law Center, National Women's Political Caucus, NC Equity, Northwest Women's Law Center, Organization of Pan Asian American Women, Inc., Wider Opportunities for Women, Women and Employment, Inc., Women Employed, Women's Law Project, and YWCA of the U.S.A. Robert E. Williams, Douglas S. McDowell, Salvador T. Perkins, MCGUINESS & WILLIAMS, Washington, D.C., for Amicus Curiae Equal Employment Advisory Council.

CHAPMAN, Circuit Judge:

On this appeal, we must decide whether the Acting Secretary of labor erred in ruling that, for the purposes of the federal contract compliance laws, the University of North Carolina system constitutes a single, unified state agency, of which the University's campuses are merely sub-agencies. This question is pertinent because it will determine whether, because of their affiliation with the University, the campuses that have not entered contracts with the federal government must, nonetheless, submit to the compliance reviews conducted by the Office of Federal Contract Compliance Programs. We hold that, because of the peculiarities of the statutory scheme creating the University of North Carolina, for the purposes of the federal contract compliance law, the University is, indeed, a single state agency and, because of their connection with that agency, the non-contracting campuses must submit to compliance reviews, regardless of whether they are direct participants in any federal contract. We therefore reverse the judgment of the district court.

## I.

The laws of North Carolina provide that the Board of Governors of the University of North Carolina (UNC) "shall be known and distinguished by the name of 'the University of North Carolina.'" N.C. Gen. Stat. § 116-3. UNC is constituted as a "body politic and corporate," id., and is composed of 16 "constituent institutions" or campuses. Id. § 116-4. UNC's Board of Governors is "responsible for the general determination, control, supervision, management and governance of all affairs of the constituent institutions." Id. § 116-11. In executing these statutorily imposed duties, the Board maintains substantial control over many of the activities of the campuses: it determines each campus' academic mission and enrollment level; it sets the tuition for each campus; it prepares one budget for the entire university system; and it appoints each campus' senior administrative staff and tenured faculty. Id. The Board also selects the President of UNC, the University's "chief administrative officer." Id. § 116-14.

A separate chancellor and board of trustees govern each of the individual UNC campuses. The board of trustees of each campus exercises those powers that the Board of Governors has delegated to it. Id. § 116-33. Each chancellor enjoys executive authority over the affairs of his campus and may act "subject to the direction of the President." Id. § 116-34. The statues creating UNC contemplate very broad delegations of authority to the boards of trustees and the chancellors of the different campuses. The Board of Governors may delegate "any part of its authority over the affairs of any [constituent] institution to the board of trustees or, through the President, to the chancellor." Id. § 116-11(13). However, the Board of Governors retains ultimate control over the affairs of the campuses since any delegation of authority "may be rescinded by the Board at any time in whole or in part." Id.

The President of UNC has established procedures that campuses must follow when applying for federal contracts. For contracts that fall into five specified categories, a bidding campus must secure the President's approval before submitting a proposal.[1]

---

1 The campuses must secure the President's advance approval before bidding on contracts that:

> (1) obligate the University or the campus to continue the pro gram or activity beyond the life of the grant or to retain personnel initially employed under the contract;
> (2) involve the creation of a new organizational unit within the University or a constituent institution;
> (3) involve the planning or establishment of a new degree pro gram or program track;
> (4) require matching funds or contributions that cannot be provided from the campus' current resource levels; or
> (5) would impede the elimination of race discrimination in the University.

For all other contracts, the procedures provide that a campus may bid without the President's prior approval, but the campus must send a copy of its contract proposal to the President who may, at any time, withdraw, revise, or amend it. Under these contract procedures, eleven of UNC's sixteen campuses have entered contracts with the federal government. The North Carolina School of the Arts (NCSA) and the University of North Carolina - Asheville (UNC-A) are two of the campuses that have not.

Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793,[2] section 402 of the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 2012,[3] and section 202 of Executive

---

2 The relevant portion of the rehabilitation Act of 1973 provides that:

> Any contract in excess of $2,500.00 entered into by any Federal department or agency . . . shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals.

3 The relevant portion of the Vietnam Era Veterans Readjustment Assistance Act provides that:

> Any contract in the amount of $10,000.00 or more entered into by any department or agency . . . shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified special disabled veterans and veterans in the Vietnam era.

Order 11236 [4] impose certain nondiscrimination and affirmative action obligations on parties to federal contracts. The two pieces of legislation imposed these obligations on "part[ies] contracting with the United States," while the injunction in the executive order is directed at "the contractor." The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor is charged with conducting periodic reviews of entities that have contracted with the government to ensure that the contractors have complied with their non-discrimination and affirmative action obligations. 41 C.F.R. §§ 60-1.20, 60-250.25, 60-741.25. In 1981, UNC-A and NCSA refused to submit to one of these compliance reviews, taking the position that, since they had entered no federal contracts, the statutes and the executive order imposed no affirmative action obligations on them and the OFCCP was therefore without authority to require them to submit to a review. Seeking to compel the campuses to submit to a compliance review, the OFCCP filed an administrative complaint against them.

The administrative proceeding culminated when the Acting Secretary of Labor ruled that the "University of North Carolina is, by definition, one agency, not sixteen separate independent agencies." The Acting Secretary reasoned that, when a UNC campus is awarded a contract, UNC is properly viewed as the contractor: "[t]he constituent institutions are capable of entering into contracts only as agents of UNC because, under state law, only UNC, and not the constituent institutions, is a corporate body with the power to contract." Once UNC becomes the contractor, the Acting Secretary ruled, all of the constituent campuses are obligated to submit to compliance reviews. Although UNC has delegated contracting authority to its campuses,

---

4 The pertinent portion of Executive Order 11246 provides that:

> The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that emmployees are treated during employment, without regard to their race, color, religion, sex, or national origin.

the Acting Secretary reasoned that such delegation does not transform the campuses into independent agencies: they continue to contract as agents of UNC. The Acting Secretary ordered the two non-contracting campuses to submit to review, stating that their refusal to do so would result in the cancellation of all of UNC's federal contracts.

UNC sought review of the Acting Secretary's ruling in the U.S. District Court for the Eastern District of North Carolina. The court held that only those UNC campuses that had entered federal contracts were subject to OFCCP's review authority. In reaching this decision, the court relied heavily on Department of Labor regulations implementing the statutes and the executive order.[5]

Those regulations define the term "government contract" as an agreement "between any contracting agency and any person" for supplies, services, or property. See, e.g., 41 C.F.R. § 60-1.3. For the purposes of this definition, the regulations define "person" to include "any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government." Id. The court held that the plaintiff UNC campuses were not contractors in their own names, nor were they an "'agency, instrumentality, or subdivision' of a 'person' which is a party to a government contract." This holding turns on the district court's observation that the Board of Governors has delegated to the constituent institutions the power to contract. The court held that only the campuses that had actually entered federal contracts qualified as contractors and were subject to OFCCP's compliance reviews. The Secretary of Labor has appealed to this court.

---

5 See 41 C.F.R. § 60-1.3 (dealing with Executive Order 11246); 41 C.F.R. § 60-250.2 (dealing with Vietnam Era Veterans Readjustment Assistance Act); 41 C.F.R. § 60-741.2 (implementing Rehabilitation Act of 1973). The wording of the regulations implementing the three different contract compliance laws differs slightly, but, for the purposes of our decision, the differences are not material.

## II.

As a preliminary matter, we must determine what, if any, level of deference to accord to the Acting Secretary's view of the statutory scheme creating the University of North Carolina. The Acting Secretary inquired into the nature of the scheme in order to determine whether, by virtue of the University's unitary nature, the contracts of certain UNC campuses conferred jurisdiction on OFCCP to conduct compliance reviews of non-contracting campuses. A fundamental precept guiding the judicial review of agency action is that the reviewing court owes substantial deference to any agency's construction of the statutes that it is charged with administering. ***Chevron U.S.A. v. Natural Resources Defense Council***, 467 U.S. 837, 842-44 (1984); ***Blum v. Bacon***. 457 U.S. 132, 141 (1982); ***Citizens to Preserve Overton Park v. Volpe***, 401 U.S. 402, 416 (1971). This holds true as well for an agency's determination of its own jurisdiction when that determination turns on the agency's findings of fact. ***See O'-Leary v. Brown-Pactific-Maxon, Inc.***, 340 U.S. 504, 508 (1951); ***Michigan Mutual Liability Co. v. Arrien***, 344 F.2d 640, 645-46 (2d Cir. 1965). This, however, was not the nature of the jurisdictional determination of the Acting Secretary with which we are here presented.

Here, the agency's determination of its jurisdiction was premised on its construction of a state statute and, as such, it is not entitled to the weight that we would normally accord to agency jurisdictional rulings. The policies of legislative delegation, ***see Schweiker v. Gray Panthers***, 453 U.S. 34, 43-44 (1981), and agency competence, ***see United States v. Shimer***, 367 U.S. 374, 382-83 (1961), that militate in favor of the doctrine of administrative deference give way when the question before an agency no longer involves issues on which the agency's expertise gives it a special competence. In those instances where an agency has ruled on a question of law outside of its area of expertise, we no longer defer to the rulings of the agency, but instead conduct the more searching inquiry of de novo review. With this standard in mind, we now turn to the question before us.

## III.

Our inquiry centers on the legislative scheme under which UNC and its campuses are organized. We hold that the North Carolina statute, discussed above, supports the Acting Secretary's conclusion that UNC "is, by definition, one state agency, not sixteen separate, independent agencies." The statute constitutes the Board of Governors for UNC as "a body politic and corporate." N.C. Gen. Stat. § 116-3. It does not grant this status to any of the sixteen campuses that the Board administers. Under the statute, only the Board of Governors is "capable in law to sue and be sued." Id. The statute further provides that UNC "shall be composed of" the constituent institutions and it expressly states that the North Carolina Carolina School of Arts is a part of the University of North Carolina." Id. §§ 116-4, 116-65.

There is no doubt, as UNC argues, that the individual campuses enjoy a substantial measure of autonomy; they operate largely free from the control of the Board of Governors. The record clearly shows that, on a day-to-day basis, the operations of the two campuses here in question are determined primarily by their respective chancellors and boards of trustees. This is true, however, because of the independence that the Board has allowed to the campuses, and not because of any autonomy with which they are inherently endowed under the relevant statutes. The Board of Governors is charged with the "general determination, control, supervision, management and governance of all affairs of the constituent institutions." Id. § 116-11(2). Under the statute, the Board possesses broad authority to "delegate any part of its authority over the affairs of any institution to the board of trustees or, through the President, to the chancellor of the institution." Id. § 116-11(13). A delegation of the Board's power to the campuses does not deprive the Board of control over the campuses' activity with which the delegation is connected. Instead, the statute provides that "[a]ny delegation of authority may be rescinded by the Board at any time in whole or in part." Id. The statute also provides that the chancellor of each campus acts "subject to the direction of the President." Id. § 116-34(a). Regardless of any authority that the Board of Governors may

have delegated to the constituent campuses of UNC, the Board retains ultimate control over the campuses' activity through its unlimited power to rescind any delegation.

The power relevant to this appeal is the Board's power to contract. Under procedures established by the President of UNC, the various campuses enjoy substantial independence in their ability to enter into contracts. Subject to the limitations set out in note 1, supra, each UNC campus may bid for contracts -- including those with the federal government -- without the prior approval of either the President or the Board of Governors. However, the President always retains the authority to withdraw, revise, or amend a campus' contract proposals after they have been submitted. Consistent with the structure of the statutes creating UNC, the campuses exercise their delegated power to contract subject to the review of the President. Theirs is not an unbounded power to contract, but rather one circumscribed by any limitations that the President or the Board of Governors may choose to place on it. This is not the description of a university system in which the campuses are properly viewed as independent agencies. It is one which, as the Acting Secretary ruled, is comprised of a single agency of which the campuses are merely constituent parts.

We draw further support for our holding from an examination of the North Carolina Supreme Court's decision in ***Student Bar Ass'n. v. Byrd***, 293 N.C. 594, 239 S.E.2d 415 (1977). There the court ruled that the state's Open Meetings Law, N.C. Gen. Stat. § 143-318.2, did not require that the meetings of the law school faculty at UNC-Chapel Hill be open to the public. The statute in question applied to"[a]ll official meetings of the governing and governmental bodies" of the state. In a passage with singular applicability to the case at bar, the court held that the statute did not require the opening of meetings of the law school faculty since the faculty did not qualify as a "governing body":

> The faculty of the School of Law are employees of the Board of Governors, authorized by the Board to make certain determinations with reference to the day-to-day operation of the School of Law, but all such determinations by the faculty are subject to the power of the Board of Governors to modify or reverse them. The fact that such superior power is rarely used by the holder of it does not abrogate it. Thus the faculty of the School of Law is not the "governing body" of the School of Law. The "governing body" is the Board of Governors.

293 N.C. at 602, 239 S.E.2d at 421.

In dicta, the court further stated that the opening of faculty meetings of the public might place the Law School in violation of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(b)(1), which provides that "[n]o funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of educational records . . . of students without the written consent of their parents." Speaking of the effect of such a violation, the court noted the "possibility that all further Federal financial aid to the entire University of North Carolina, including all its component institutions, [might] be jeopardized by an interpretation of the Open Meetings Law making it applicable to meetings of the faculty of the School of Law." 293 N.C. at 599, 239 S.E.2d at 419 (emphasis added). Clearly implicit in this statement is the notion that all of the component institutions of UNC constitute a single "educational agency or institution."

We are unpersuaded by UNC's argument that the Acting Secretary's decision in this case would open to OFCCP review a state's entire administrative structure whenever one state agency has entered a federal contract. An examination of the statutes creating the University of North Carolina clearly reveals that its

components are significantly more closely related than are the independent state agencies to which UNC analogizes them in its argument. We are confident that our decision today will not be construed in the future to permit OFCCP review of a state's department of social services based solely on the federal contracts that the state's university has entered. Furthermore, even if our holding could be construed to support such a result, Department of Labor regulations would prevent it. The Department has issued regulations implementing the contract compliance laws that state that

> [t]he requirements of the affirmative action clause in any contract or subcontract with a state or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

See, e.g., 41 C.F.R. § 60-1.5(a)(4). Clearly, an "agency, instrumentality, or subdivision" of the state government that was "not participat[ing] in work on or under the contract" would not be subject to OFCCP's review authority. At the same time, however, this regulation does not operate to exempt the non-contracting campuses of UNC because the state statutory scheme constitutes them as mere components of UNC, rather than as an "agency, instrumentality, or subdivision of [state] government" that is independent of UNC.

## IV.

We hold that the Acting Secretary of Labor was correct in concluding that the UNC system was a single state agency of which the complaining campuses are merely parts and that the noncontracting campuses therefore fell within OFCCP's review jurisdiction. Although eleven of UNC's sixteen campuses have, in their own names, bid for and received federal contracts, they have done so subject to the power of review that UNC's Board of Governors and President have retained over their actions. In

ruling that the campuses that had entered federal contracts had done so as agents of UNC, the Acting Secretary merely stated what clearly appears from an examination of the relevant North Carolina statutes. Given the unitary nature of the UNC system, the Acting Secretary was justified in holding that, as a result of the entry of some constituent campuses into federal contracts, the entire UNC system became a "contractor" within the meaning of the contract compliance laws. If the Acting Secretary was correct in concluding that UNC qualifies as a "contractor," it follows a fortiori that the University's constituent campuses are open to OFCCP compliance reviews by virtue of their being components of the UNC system. This is true regardless of whether they have entered federal contracts. Accordingly, the judgment of the district court is

REVERSED

WIDENER, Circuit Judge, dissenting:

I respectfully dissent for two reasons which relate to the same basic proposition.

First, as the district court pointed out in its opinion, the executive order under consideration, Executive Order 11246, applies to "the contractor." As well, 29 U.S.C. § 793, the Rehabilitation Act and 38 U.S. C. § 2012, the Vietnam Era Veterans Readjustment Assistance Act, apply to "the party contracting with the United States." As the district court further points out, and I think correctly, N.C. Gen. Stat. § 116-11(13) provides that the "Board of Governors of the university system may delegate any part of its authority over the affairs of any institution . . . to the Chancellor of the institution. . . ." So the requirement of affirmative action is tied by statute and regulation to those contracting with the United States and not to others. And under the North Carolina statute, the authority to contract has been delegated to the separate entities entering into the contracts involved. Whatever the other campuses of UNC may have done, neither UNC Asheville nor The School of the Arts has entered into any contract with the United States within the meaning of this case.

Second, and of greater consequence, the regulations of the Office of Federal Contract Compliance Programs of the Department of Labor have obviously envisioned just such a situation as that existing here and provided that

> [t]he requirements of the affirmative action"* clause of any contract or subcontract with a state or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

41 C.F.R. §§ 60-250.3(a)(4), 60-741.3(a)(4).

Since UNC Asheville and The North Carolina School of the Arts do "not participate in work on or under the contract or subcontract," under the government's own regulations, they should not be included within the "requirements of the affirmative action" clauses.

The majority holds that the just-quoted regulation does not apply to either UNC Asheville or The School of the Arts because they are "mere components of UNC" rather than an "agency, instrumentality or subdivision of . . . [state] government."

I regret that I cannot agree to this distinction. Even if it might reasonably be said that neither UNC Asheville nor The School of the Arts is a "subdivision" of the government of North Carolina, which proposition I suggest is doubtful at best, it cannot be reasonably said, I think, the majority to the contrary, that UNC Asheville is not an "agency" or an "instrumentality" of state government. And the same goes for The School of the Arts.

---

* The italicized words appear in 41 C.F.R. § 60-1.5(a)(4) as "equal opportunity." I don't think the difference in wording makes any difference either in reasoning or result. I have added italics for ease of discussion.

The holding that UNC Asheville and The School of the Arts are "components of UNC" (the state owned and operated university) but are not agencies or instrumentalities of the state government is such a nice distinction that I would not embrace it. I am thus of opinion that the government's construction of its own regulation is unreasonable.

I would affirm the judgment of the district court.

# APPENDIX B

## UNITED STATES COURT OF APPEALS

## FOR THE FOURTH CIRCUIT

FILED
December 19, 1990

No. 89-3359

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; UNIVERSITY OF NORTH CAROLINA, at Asheville; THE NORTH CAROLINA SCHOOL OF THE ARTS

Plaintiffs - Appellees

v.

UNITED STATES DEPARTMENT OF LABOR; ELIZABETH H. DOLE, SECRETARY OF LABOR; UNITED STATES OF AMERICA;

Defendants - Appellants

WOMEN'S LEGAL DEFENSE FUND; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; EQUAL RIGHTS ADVOCATES; MEXICAN -AMERICAN LEGAL DEFENSE AND EDUCATION FUND; MEXICAN-AMERICAN WOMEN'S NATIONAL ASSOCIATION; NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN; NATIONAL COUNCIL OF LA RAZA; NATIONAL COUNCIL OF NEGRO

WOMEN, INCORPORATED; NATIONAL INSTITUTE FOR WOMEN OF COLOR; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL WOMEN'S LAW CENTER; NATIONAL WOMEN'S POLITICAL CAUCUS; NC EQUITY; NORTHWEST WOMEN'S LAW CENTER; ORGANIZATION OF PAN ASIAN AMERICAN WOMEN, INCORPORATED; WIDER OPPORTUNITIES FOR WOMEN; WOMEN AND EMPLOYMENT, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; YWCA OF THE USA; EQUAL EMPLOYMENT ADVISORY COUNCIL

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to the Court. In a requested poll of the Court, Judges Russell, Widener, Sprouse, Wilkinson and Wilkins voted to rehear the case in banc; and Judges Ervin, Hall, Murnaghan, Chapman, and Niemeyer voted against rehearing the case in banc. Judge Phillips was disqualified. As a majority of the judges did not vote to grant rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc is denied.

Entered at the direction of Judge Chapman.

For the Court,

JOHN M. GREACEN
CLERK

# APPENDIX C

## UNITED STATES DISTRICT COURT
## EASTERN DISTRICT OF NORTH CAROLINA

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, THE UNIVERSITY OF NORTH CAROLINA AT ASHEVILLE, AND THE NORTH CAROLINA SCHOOL OF THE ARTS

JUDGMENT IN A CIVIL CASE

V.

THE U.S. DEPARTMENT OF LABOR, THE HONORABLE ELIZABETH DOLE, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, AND THE UNITED STATES

Case Number: 89-242-CIV-5

**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xxx **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants, their officers, agents, representatives, and all persons acting by, through, or in concert with them, be and they are hereby restrained and enjoined from implementing or enforcing the 23 January 1989 Order and Final Administrative Decision of the Acting Secretary, and from taking any actions, either directly or indirectly, which in any way may have an adverse effect on plaintiffs' ability to seek and obtain contracts with the United States, its departments,

agencies or subdivisions, and with other contractors having contracts with the United States, its agencies or departments, based on plaintiffs' alleged failure to comply with Executive Order No. 11246, Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793, and the affirmative action provisions of the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 2012. (Britt, J)

THIS JUDGMENT FILED AND ENTERED ON SEPTEMBER 15, 1989, AND COPIES MAILED TO:

Thomas J. Ziko
Asst. Atty. General
Edwin M. Speas, Jr.
Special Deputy Atty. General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602

Jerome Davis
U.S. Department of Labor
200 Constitution Ave., NW,
Room N 2464
Washington, DC 20210

Ms. Margaret Person Currin
U.S. Attorney, EDNC
P.O. Box 26897
Raleigh, NC 27611

Ms. Katherine A. Baldwin
U.S. Department of Justice
Employment Litigation Sec.
-CRT Div.
P.O. Box 65968
Washington, DC 20035

September 15, 1989
Date

J. RICH LEONARD
CLERK

Jolie Skinner
(By) Deputy Clerk

# APPENDIX D

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NORTH CAROLINA**
**RALEIGH DIVISION**

No. 89-242-CIV-5-BR

| | | |
|---|---|---|
| THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, THE UNIVERSITY OF NORTH CAROLINA AT ASHEVILLE, and THE NORTH CAROLINA SCHOOL OF THE ARTS, | ) | |
| Plaintiffs, | ) | |
| v. | ) | MEMORANDUM OPINION |
| THE UNITED STATES DEPARTMENT OF LABOR, THE HONORABLE ELIZABETH DOLE, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, and THE UNITED STATES, | ) | |
| Defendants. | ) | |

The Board of Governors of the University of North Carolina (UNC) and two of its constituent institutions instituted this action on 30 March 1989 against the United States Department of Labor. Plaintiffs seek relief from an order of the Secretary of Labor which could cancel all federal contracts and subcontracts

which the University and all of its constituent institutions now have[1] and prohibit the University from entering any further contracts. On 27 April 1989 the court granted plaintiffs' request for a temporary restraining order. Since the facts were not in dispute, the court ordered, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, the trial advanced and consolidated with plaintiffs' request for a preliminary injunction. The parties agreed on an expedited briefing schedule and a hearing was held on 26 June 1989. The court finds that the decision of the Secretary is contrary to law and will grant the injunctive relief sought.

## I.

The Secretary of Labor (the Secretary) is responsible for the enforcement of three equal employment opportunity laws applicable to federal contractors, Executive Order 11246 (Executive Order), Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (Rehab Act), and the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. § 2012 (VEVRAA).[2]

A. Executive Order. This order provides, in part:

> Except in contracts exempted in accordance with . . . this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:
>
> > "During the performance of this contract, the contractor agrees as follows:

---

1 As of 1 March 1989, 277 such contracts were held, having a total value in excess of $48 million.

2 Sometimes hereafter this executive order and two statutes will be referred to collectively as "the contract compliance laws."

> "(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin.

§ 202.[3] Thus, every contractor must, as a condition of doing business with the Federal Government, agree not to discriminate. Further provisions of the Order require contractors to take affirmative action to promote the employment of individuals protected under it. § 202(1). Contractors must also expressly agree to "comply with all . . . of the rules, regulations, and relevant orders of the Secretary of Labor," to "furnish all information and reports required . . ." and to "permit access to [their] books, records, and accounts . . . for purposes of investigation to ascertain compliance." § 202 (4)-(5). Failure to comply may result in the cancellation of contracts and debarment from further contracts. § 202(6).[4]

B. Rehab Act. Section 503 of this Act provides, in part:

> Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and

---

3 The Order gives the Secretary authority to "adopt such rules and regulations and issue such orders as are deemed necessary and appropriate" to effectuate the Order. § 201.

4 The regulations implementing VEVRAA and the Rehab Act have similar provisions. See 41 C.F.R. §§ 60-250.4, 60-250.53, 60-741.4 and 60-741.53.

> advance in employment qualified individuals with handicaps . . . .

29 U.S.C. § 793(a) (Supp. 1989)

C. VEVRAA. The pertinent provision of this Act provides as follows:

> Any contract in the amount of $10,000 or more entered into by any department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.

38 U.S.C. § 2012(a).

A division of the Department of Labor known as the Office of Federal Contract Compliance Programs (OFCCP) enforces the contract compliance laws. It checks on compliance by periodically reviewing the facilities of the contractor. 41 C.F.R. § 60-1.20. At the beginning of a compliance review, OFCCP typically requests the contractor to submit for review the affirmative action program (AAP) for the selected facility, after which an on-site review of the facility is conducted.

OFCCP filed an administrative complaint against UNC in July 1984, alleging that one of the constituent institutions, the North Carolina School for the Arts (NCSA), had submitted a deficient AAP; that another constituent institution, the University of North Carolina at Asheville (UNC-A), had failed to submit an AAP; and that UNC had refused OFCCP access to either campus to conduct on-site reviews. On 12 December 1986, an

Administrative Law Judge (ALJ) entered an order restraining UNC, NCSA and UNC-A from violating the contract compliance laws and recommended that, upon their failure to comply with the order, all federal contracts with UNC and its constituent institutions be terminated. The order also recommended that UNC and its constituent institutions be prohibited from entering into any other federal contracts until they are in compliance with the laws. UNC filed exceptions to the ALJ's rulings with the Secretary who, on 23 January 1989, issued a Decision and Final Administrative Order directing the cancellation of all existing government contracts and debarment from future contracts unless UNC complied with the terms of the Order and the contract compliance laws within ninety days. The Secretary denied a subsequent request for a stay by Order dated 25 April 1989.

## II

UNC is composed of sixteen constituent institutions.[5] N.C. Gen. Stat. § 116-4. The entire system is ruled by a Board of Governors which also controls, supervises and manages the affairs of the constituent institutions. N.C. Gen. Stat. § 116-11(2). The administrative head of UNC is the President who reports to the Board of Governors. N.C. Gen. Stat. § 116-14. Each constituent institution has an administrative head, the Chancellor, and a Board of Trustees which has those powers and duties delegated

---

5 Appalachian State University, East Carolina University, Elizabeth City State University, Fayetteville State University, North Carolina Agricultural and Technical State University, North Carolina Central University, North Carolina School of the Arts, North Carolina State University at Raleigh, Pembroke State University, the University of North Carolina at Asheville, the University of North Carolina at Chapel Hill, the University of North Carolina at Charlotte, the University of North Carolina at Greensboro, the University of North Carolina at Wilmington, Western Carolina University and Winston-Salem State University.

to it by the Board of Governors. N.C. Gen. Stat. §§ 116-33 and -34.

By statute "[t]he Board of Governors of the University of North Carolina shall be known and distinguished by the name of 'the University of North Carolina' and shall continue as a body politic and corporate. . . ." N.C. Gen. Stat. § 116-3. Broad corporate powers have been given to the Board of Governors. **Id.** Any part of the Board of Governors' authority over the affairs of the constituent institutions may be delegated to the respective Board of Trustees or, through the President, to the Chancellor of the institution. N.C. Gen. Stat. § 116-11(13).

## III

Plaintiffs contend, and defendants do not deny, that, as expressly permitted by statute, the Board of Governors and the President of UNC have delegated to the constituent institutions the power to enter into contracts without prior approval of either the Board of Governors or the President.

On 27 August 1985, the parties stipulated to the accuracy of a computer printout of all federal contracts held by "institutions within the University of North Carolina" from 1 March 1981 to June 1985. This printout, a part of the administrative record, lists 521 contracts totalling $56,153,353, divided among eleven institutions.[6] Five constituent institutions are listed as having no

---

6

N.C. A & T State University 56; Appalachian State University 2; East Carolina University 29; N.C. Central University 8; Pembroke State University 1; N.C. State University 176; UNC Chapel Hill 191; UNC Charlotte, 11; UNC Greensboro 4; Western Carolina University 31; and UNC Wilmington 12.

contracts.[7] Listed separately, but showing no contracts, is "UNC-GENERAL ADMIN."[8]

## IV

A. Plaintiffs. In support of their contention that the Secretary's decision is erroneous, plaintiffs advance several arguments:

(1) The Tenth Amendment prohibits federal agencies from imposing contract conditions on the states that are not precisely and unambiguously stated in legislation or properly adopted regulations;

(2) The Acts at issue in this case do not apply to the states;

(3) Only Congress may determine the extent to which units of state government are subject to the Acts at issue;

(4) The Secretary's decision exceeded her authority; and

(5) The Secretary's decision is arbitrary and capricious.

B. Defendants. In addition to offering arguments in rebuttal to plaintiffs' contentions, defendants contend that the Secretary has acted within the scope of her authority and that her decision is rational.

---

7 UNC Asheville, Elizabeth City State University, Fayetteville State University, Winston-Salem State University and the N.C. School of the Arts.

8 Although not specified in the statute creating the university system, the office of President and the President's staff is known throughout the state as the "general administration."

## V

A. Standard of Review. Section 706 of the Administrative Procedures Act, 5 U.S.C. § 706, governs this court's action. The Supreme Court has said that the action of a federal agency may be set aside only if is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." ***Citizens to Preserve Overton Park v. Volpe***, 401 U.S. 402, 414 (1971), ***quoting*** 5 U.S.C. § 706(2)(A). Accord ***National Wildlife Federation v. Hanson***, 623 F.Supp. 1539 (E.D.N.C. 1985)

The decision of the Secretary is entitled to a presumption of regularity. ***Overton Park***, 401 U.S. at 415. "Where an agency is entrusted with the authority to enforce a statute, its construction of the controlling statute must be upheld if it is sufficiently reasonable; the reviewing court must not substitute its judgment for that of the agency." ***Trawick v. Drug Enforcement Administration***, 861 F.2d 72, 75 (4th Cir. 1988).

B. Relying on ***South Dakota v. Dole***, 483 U.S. 203 (1987), and ***Pennhurst State School and Hospital v. Halderman***, 451 U.S. 1 (1981), plaintiffs contend that Congress has failed to unambiguously set forth its intention to condition the receipt of federal funds on compliance with the statutes and regulations at issue. Plaintiffs are mistaken. Unlike ***Pennhurst***, the language at issue here leaves no doubt that the right to enter contracts with the government is conditioned on the contracting party agreeing to the non-discrimination provisions. Equally important, the provisions at issue here were not adopted solely under the spending power of the Constitution, a necessary assumption in plaintiffs' contention. Section 503 is a part of the Rehabilitation Act which the Supreme Court has previously acknowledged was passed pursuant to § 5 of the Fourteenth Amendment. ***Welch***

***v. Texas Department of Highways and Public Transportation***, 483 U.S. 468, 472 n.2 (1987).

In like manner, the affirmative action provision of VEVRAA, as amended, 38 U.S.C. § 2012, derives its constitutional authority from the power of Congress to engage in war. ***Peel v. Florida Department of Transportation***, 600 F.2d 1070 (5th Cir. 1979), cited with approval in ***United States v. Onslow County Board of Education***, 728 F.2d 628, 639 (4th Cir. 1984). Tenth Amendment limitations are inapplicable to legislation adopted pursuant to the war power. ***Onslow County***, 728 F.2d at 641.

C. Plaintiffs contend that the contract compliance laws do not apply to the states. The underlying rationale of this argument is the same as that set forth in B, above, i.e., that it is not plainly and unambiguously stated that application extends to the states. Plaintiffs rely on ***Richard Anderson Photography v. Brown***, 852 F.2d 114 (4th Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 1171 (1989), which they contend held that the term "persons" as used in the Copyright Act of 1976, 17 U.S.C. §§ 1701 et seq., was not intended to include "states" within its meaning.[9] Thus, plaintiffs contend, since Congress and the President did not specifically define "the contracting party" and "contractor" to include "states" the agency charged with enforcing the laws may not constitutionally do so. A similar argument was rejected by the Supreme Court in *California v. Taylor*, 353 U.S. 553 (1957). The Court held there that the language "any" in the Railway Labor Act preceding "carrier by railroad" was broad enough to encompass a state-owned railroad. The Court considered it significant that Congress had not specifically exempted the states as it had

---

9 This decision construed the term "anyone" in 17 U.S.C. § 501(a) rather than the term "persons." The word construed has no effect on plaintiffs' contention.

done in other laws. Id. at 564-65. See also, ***Atascadero State Hospital v. Scanlon***, 473 U.S. 234 (1985),[10] and ***United States v. California***, 297 U.S. 175 (1936).

D. Plaintiffs next contend that Congress has improperly delegated to the Secretary of Labor "the extent to which Section 503 and Section 402 will intrude upon traditional areas of State authority and responsibility." This argument is based on ***Garcia v. San Antonio Metropolitan Transit Authority***, 469 U.S. 528 (1985), and, in particular, the following statement therefrom:

> [T]he principal and basic [Tenth Amendment] limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action.

Id. at 556.

Relying on three law review articles,[11] plaintiffs contend that the Tenth Amendment affords procedural protection to the states that requires Congress to determine whether legislation will intrude upon "traditional areas of State authority and responsibility" and, if so, also to determine the extent to which such intrusion is appropriate. As indicated, plaintiffs also contend that this duty is non-delegable.

---

10 The specific holdings of ***Atascadero State Hospital and Garcia***, cited below, have been overruled by subsequent legislation. 42 U.S.C.A. § 2000d-7 (West Supp.). However, the analysis relied upon is unchanged.

11 Baird, State Empowerment Since Garcia, 18 Urb. Law 491 (1986); Odom, The Tenth Amendment After Garcia: Process Based Procedural Protections, 135 Pa. L. Rev. 1657 (1987); Redish, Constitutional Federalism and Judicial Review, 62 N.Y.U. L. Rev. 1 (1987).

Plaintiffs misread *Garcia*. Rather than holding that states may avoid compliance with federal laws where the process of enactment did not adequately protect their rights, the Court held that the states are adequately protected by the political process.

E. plaintiffs' last two contentions, both based on 5 U.S.C. § 706, will be considered together. This statute provides, in part, as follows:

> The reviewing court shall--
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

5 U.S.C.A. § 706(2)(A) (West 1977).

In *Overton Park*, the Supreme Court made clear that the court's obligation under this statute is threefold. The court must consider, first, whether the agency acted within the scope of its authority; second, whether the actual choice made by the agency was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; and third, whether the agency followed the procedural requirements. 401 U.S. at 415-17.

The action of a federal agency which exceeds its authority is invalid and will be set aside. *Steele v. Federal Communications Commission*, 770 F.2d 1192 (D.C.Cir. 1985). The begin-

ning point for a determination of the Secretary's authority is the statutes[12] themselves. ***Department of Transportation v. Paralyzed Veterans of America***, 477 U.S. 597, 604 (1986). The real point of contention between the parties, the resolution of which is determinative of this matter, is to whom do the contract compliance laws apply?

The Executive Order applies to "the contractor." Both the Rehab Act and VEVRAA apply to "the party contracting with the United States." Regulations adopted by the Department of Labor to implement the contract compliance laws contain definitions which are pertinent to the inquiry.

In the regulations implementing the Executive Order, the following definitions appear:

> "Government Contract" means any agreement . . . between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangement.
>
> "Contracting Agency" means any department, agency, establishment, or instrumentality in the executive branch of the Government . . .
>
> "Person" means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

---

12 Including the Executive Order.

41 C.F.R. § 60-1.3.[13]

Plaintiffs' basic contention is simple and straightforward; i.e., that since neither the University of North Carolina nor the University of North Carolina at Asheville nor the North Carolina School of the Arts is a party to any contract with a contracting agency, the two named constituent institutions are not subject to the contract compliance laws. They are not a "contractor" or "contracting party" in their own name nor are they an "agency, instrumentality, or subdivision" of a "person" which is a party to a government contract. Yet, this basic contention has never been met either in the various orders of the ALJ and the Secretary or the brief of defendants in this action. Rather, they continue to attempt to answer the contention by asserting that the University of North Carolina is a single state agency, an obvious fact which plaintiffs have never denied. The Orders go to great length to recite the organizational structure of the university system and the powers and duties of those entrusted with its administration without stating why a constituent institution within the university system cannot be a contractor within the meaning of the contract compliance laws. The Acting Secretary, Dennis E. Whitfield, referred to this contention when he stated in his Decision and Final Administrative Order, at page 6:

> The fact that the government contracts of some constituent institutions were entered into without review or approval by the Board of Governors or by the other constituent institutions has little bearing on the issue here. The constituent institutions, their chancellors and other officers have delegated power to contract, but that delegation does not make them separate and

---

13 41 C.F.R. § 60-250.2, dealing with VEVRAA, and 41 C.F.R. § 60-741.2, dealing with the Rehab Act, contain nearly identical definitions, the differences being insignificant and not material to a decision here.

> independent of the University. . . . [T]he constituent institutions of UNC act as agents of the University and remain subject to the control of and responsible to the Board of Governors and the President. The constituent institutions are capable of entering into contracts only as agents of UNC because, under state law, only UNC, and not the constituent institutions, is a corporate body with the power to contract.[14]

The above portion of the Secretary's order is, with one exception, supported by the record.

N. C. Gen. Stat. § 116-11(13) provides:

> The Board [of Governors] may delegate any part of its authority over the affairs of any institution to the board of trustees or, through the President, to the chancellor of the institution in any case where such delegation appears necessary or prudent to enable the institution to function in a proper and expeditious manner. Any delegation of authority may be rescinded by the Board at any time in whole or in part.

Thus, contrary to the statement in the Secretary's order, under the law of the State of North Carolina the power to contract may properly be delegated to the constituent institutions. The Secretary's order recognizes that such delegation of authority has taken place. And, as plaintiffs point out, the contracting agencies in the 277 government contracts apparently do not contend that the contracts are invalid. Surely the various government agencies would not have entered contracts having a value in excess of

---

14 This order was entered on 23 January 1989 during the change in administrations in Washington when the office of Secretary of Labor was vacant.

$48 million without having first determined that the contractors had the power and authority to contract.

Defendants contend that if plaintiffs' argument is accepted OFCCP would be hamstrung in carrying out its duties as it would have to "pierce the corporate veil" to "determine whether (1) the corporation has authorized its facilities or divisions to contract independently, and (2) if so, whether government contracts were made without review or approval at higher levels." In fact, the opposite appears to be true. As it is undisputed that neither the University of North Carolina nor the Board of Governors of the University of North Carolina is a party to any of the contracts, someone at OFCCP had to "pierce the corporate veil" or do some extraneous research to determine that Appalachian State University was a constituent institution of the University of North Carolina.[15]

Defendants further contend that this construction of the contract compliance laws would bring OFCCP,s compliance efforts to a standstill as it would require OFCCP before initiating a compliance review to "gather all government contracts[16] from the 59 separate Federal contracting agencies in order to ascertain whether, at that moment in time, a given corporate division or facility has a contract with the government or, alternatively, whether corporate headquarters had authorized a contract." This bleak scene, as painted by defendants, is unconvincing. In the

---

15 None of the contracts are a part of the record. Only the stipulation and computer printout lists the names of the constituent institutions which have government contracts. See n.6.

16 An estimated 21 million.

first place, OFCCP must obtain the list of contractors somewhere[17] unless OFCCP feels that it is free to presume that every ". . . natural person, corporation, partnership, unincorporated association, State [and] local government, and [every] agency, instrumentality, [and] subdivision [thereof]"[18] has a government contract with such "person" having the burden of proving that no contract exists. Secondly, as already pointed out the "authorization" argument just does not hold water.

Defendants contend that this court is obliged to give "special deference" to the interpretation placed on these laws by the Department of Labor inasmuch as it is charged with the enforcement of the laws. The statement of law is correct. ***United States v. New Orleans Public Service, Inc.***, 553 F.2d 459, 465 (5th Cir.1977), vacated and remanded on other grounds, 436 U.S. 942 (1978). The application, however, is flawed. This court is not required to blindly follow an erroneous interpretation of the law by an agency charged with the law's enforcement. Otherwise, judicial review of agency decisions would be meaningless. Defendants seek to complicate an otherwise simple task. A "contractor" is, as defendants' regulations state, a "person" who has a government contract, nothing more, nothing less.

If the President and Congress had intended the contract compliance laws to embrace all institutions of higher learning in a state when one of the institutions entered into a government contract it would have been easy enough to so provide. It is not the province of this court, or the Department of Labor, to place

---

17 Counsel was unable to inform the court at oral argument just how the list of contractors is obtained!!

18 41 C.F.R. § 60-1.3.

expansive and strained construction on simple words to accomplish such a result.

## VI

For the reasons set forth above, the court concludes that the decision of the Secretary of Labor is not in accordance with law. An order will issue making the injunctive relief heretofore granted permanent.

This 13th September 1989.

W. EARL BRITT
United States District Judge

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NORTH CAROLINA**
**RALEIGH DIVISION**

No. 89-242-CIV-5-BR

| | | |
|---|---|---|
| THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, THE UNIVERSITY OF NORTH CAROLINA AT ASHEVILLE, and THE NORTH CAROLINA SCHOOL OF THE ARTS, | ) | |
| Plaintiffs, | ) | |
| v. | ) | ORDER |
| THE UNITED STATES DEPARTMENT OF LABOR, THE HONORABLE ELIZABETH DOLE, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, and THE UNITED STATES, | ) | |
| Defendants. | ) | |

In accordance with Memorandum Opinion of even date herewith, it is hereby ORDERED, ADJUDGED AND DECREED that defendants, their officers, agents, representatives, and all persons acting by, through, or in concert with them, be and they are hereby restrained and enjoined from implementing or enforcing the 23 January 1989 Order and Final Administrative Decision of the Acting Secretary, and from taking any actions, either directly or indirectly, which in any way may have an adverse effect on plaintiffs' ability to seek and obtain contracts with the United States, its departments, agencies or

subdivisions, and with other contractors having contracts with the United States, its agencies or departments, based on plaintiffs' alleged failure to comply with Executive Order No. 11246, Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, and the affirmative action provisions of the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 2012.

This 13 September 1989.

W. EARL BRITT
United States District Judge

# APPENDIX E

## U.S. DEPARTMENT OF LABOR

**Secretary of Labor**
**Washington, D.C.**

DATE: January 23, 1989
CASE No. 84-OFC-20

IN THE MATTER OF

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

PLAINTIFF,

v.

THE UNIVERSITY OF NORTH CAROLINA (UNC),

DEFENDANT.

BEFORE: THE ACTING SECRETARY OF LABOR[1]

## DECISION AND FINAL ADMINISTRATIVE ORDER

The issue in this case is whether government contracts entered into by certain branches of the University of North

---

1 There is presently a vacancy in the office of Secretary of Labor. The Deputy Secretary is authorized to "perform the duties of the Secretary until a successor is appointed . . . ." 29 U.S.C. § 552 (1982 & Supp. IV 1987).

Carolina (UNC) confer jurisdiction over other branches of UNC which hold no government contracts, under the three procurement-related equal employment opportunity laws administered by Plaintiff: Executive Order No. 11,246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (1982); and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act, as amended, 38 U.S.C. § 2012 (1982).

Plaintiff filed this action on July 20, 1984,[2] alleging that Defendant violated the above laws when Defendant refused to permit access to records and to permit onsite inspection by Plaintiff for the purpose of conducting compliance reviews at the University of North Carolina-Asheville (UNC-A) and the North Carolina School of the Arts (NCSA). It is undisputed that various constituent institutions of Defendant were awarded Federal contracts between March 1, 1981 and June 1985 with a total value of $56,153,343.00, although none of these contracts was awarded to either UNC-A or NCSA. See generally 41 C.F.R. §§ 60-1.40, 60-2.1, 60-250.5, 60-741.5, and 41 C.F.R. Part 60-60 (1987). Defendant moved to dismiss the complaint on the grounds that each constituent institution of UNC is a separate state agency and that, therefore, Plaintiff had no jurisdiction over UNC-A or NCSA because neither institution holds government contracts.

Administrative Law Judge (ALJ) David A. Clarke, Jr. denied Defendant's motion, Order on Defendant's Motion for Pre-hearing Ruling on Issue of Jurisdiction, May 1, 1986, and ALJ Theodor P. Von Brand granted Plaintiff's motion for summary judgment based on ALJ Clarke's ruling. Recommended Decision

---

2 The procedural history of this case is set forth in detail in the Secretary's Notice and Order of January 27, 1987.

and Order (R.D. and 0.) of December 12, 1986, at 2. Defendant filed exceptions to the R.D. and 0. and a supporting brief, and Plaintiff filed responses.

Defendant asserted four exceptions to the R.D. and 0. Each exception, however, challenges a conclusion of the ALJ which is dependant upon a determination of the underlying issue, that is, whether UNC is one state agency (albeit with numerous branches or divisions) or sixteen separate state agencies to which the three laws may be applied only if each independently meets the provisions of the regulations cited above.

The statute and regulations establishing and governing the University of North Carolina contain numerous indicia that UNC is a single agency with 16 branches or divisions. The state law establishing the University of North Carolina and defining it powers and duties, North Carolina General Statutes, Chapter 116, Article I (1983) provides, among other things:

- "The Board of Governors of the University of North Carolina shall be known and distinguished by the name of 'the University of North Carolina' and shall continue as a body politic and corporate. . . ." § 116-3. (None of the constituent institutions nor any of their respective boards of trustees is constituted by the statute as a body politic and corporate. See N.C. Gen. Stat. Chapter 116, Article 1, Part 3.)

- The Board of Governors has the power to receive and dispose of gifts from donors, to sue and be sued in court, and to "do all such things as are usually done by bodies corporate and politic. . . ." § 116-3. (None of the constituent institutions nor any of their respective boards of trustees has any of these powers.)

- "The Board of Governors shall . . . govern the 16 constituent institutions . . . ." § 116-11(1).

- "The Board of Governors shall be responsible for the general determination, control, supervision, management and governance of all affairs of the constituent institutions. For this purpose the

Board may adopt such policies and regulations as it may deem wise." § 116-11(2).

- "The Board shall determine the functions, educational activities and academic programs of the constituent institutions . . . ." § 116-11(3).

- "[T]he Board shall . . . elect . . . the Chancellor of each of the constituent institutions . . . ." § 116-11(4)

- "The Board of Governors shall . . . appoint and fix the compensation of all vice-chancellors, senior academic and administrative officers and persons having permanent tenure." § 116-11(5)

- "The Board of Governors shall develop, prepare and present to the Governor . . . and the General Assembly a single, unified recommended budget for all of public senior higher education." § 116-11(9)a.

- "The Board may delegate any part of its authority over the affairs of any institution to the board of trustees or, through the President, to the chancellor of the institution in any case where such delegation appears necessary or prudent to enable the institution to function in a proper and expeditious manner. Any delegation of authority may be rescinded by the Board at any time in whole or in part." § 116-11(13).

- "The Board shall elect a President of the University of North Carolina. He shall be the chief administrative officer of the University." § 116-14(a).

The "Code" of the Board of Governors (in the nature of regulations governing the administration of the University) provides that the President "shall be the chief administrative and executive officer of the University . . . . He shall have complete authority to manage the affairs and execute the policies of the University . . . and its constituent institutions . . . ." Code, § 501 A.

The "constituent institutions," on the other hand, are defined as being simply parts of the University of North Carolina. See N.C. Gen. Stat. § 116-4 (listing the 16 constituent institutions, including UNC-A and NCSA, of which the University is "composed.") See also N.C. Gen. Stat. § 116-65 ("The North Carolina School of the Arts is part of the University of North Carolina . . . ."). The powers of the boards of trustees of the constituent institutions, in contrast to those of the Board of Governors, are limited to "the functions prescribed for [them]" which are "defined and delegated by the Board of Governors." § 116-33. The chancellor of each constituent institution is the "administrative and executive head of the institution [who] exercise[s] complete executive authority . . . subject to the direction of the President." § 116-34(a) (emphasis added).

It is thus apparent that the University of North Carolina is, by definition, one state agency, not sixteen separate, independent agencies. The Code of the Board of Governors describes UNC simply as "a single, multi-campus university. . . ." Code, § 102. None of UNC's arguments, discussed below, support a different conclusion.

UNC argues that Section 202 of Executive Order No. 11,246 (containing the basic equal employment opportunity contract clause), and sections 503 and 402, apply only to the "contractor" or "the party contracting with the United States," respectively. Therefore, the obligations imposed by those laws, UNC argues, only apply to the contractor and those privy to the contract. The branches of UNC which do hold contracts entered into them without review or approval by the Board of Governors or the other institutions. Therefore UNC argues, institutions such as UNC-A and NCSA, which hold no contracts, are not covered.

This argument assumes the issued to be proved here, that UNC-A and NCSA are separate independent agencies and could only be covered if they each had government contracts or were privy to one or more government contracts of the other institutions. But the North Carolina statute and regulations described above make it clear that UNC is a single agency of which UNC-A and NCSA are only parts. It is not necessary, therefore, to make a finding of privity of contract to established coverage.

The fact that the government contracts of some constituent institutions were entered into without review or approval by the Board of Governors or by the other constituent institutions has little bearing on the issue here. The constituent institutions, their chancellors and other officers have delegated power to contract, but that delegation does not make them separate and independent of the University. Just as in any large, geographically dispersed organization, where designated officers and managers may have the power to enter into contracts as agents of the organization, the constituent institutions of UNC act as agents of the University and remain subject to the control of and responsible to the Board of Governors and the President. The constituent institutions are capable of entering into contracts only as agents of UNC because, under state law, only UNC, and not the constituent institutions, is a corporate body with the power to contract. In this circumstance, UNC's citation from agency law, Restatement (Second) of Agency § 1(1) (1958), is inapposite. Brief in Support of Defendant's Exceptions to Recommended Decision and Order (Defendant's Brief) at 16-17. It is only applicable where independent persons mutually consent to enter into an agency relationship. Here, the constituent institutions are not "persons" or corporate bodies independent of UNC. They are only parts of the single corporate body for public senior education recognized in North Carolina law, the University of North Carolina. A more apt citation from agency law, given the complete power of control which the Board

of Governors exercises over the constituent institutions and their officers, would be the definition of a "servant":

> A servant is an agent employed by a master to perform services in his affairs whose physical conduct in the performance of the service is controlled by or is subject to the right to control by the master.

Restatement (Second) of Agency, § 2(2) (1958).

Nor is the rationale of the Court's decision in ***Pennhurst State School and Hospital v. Halderman***, 451 U.S. 1 (1981), applicable here. Defendant references, Defendant's Brief at 8-10, the discussion in ***Pennhurst*** that a party knowingly consent to the consequence of its contracts, and asserts that only the constituent institutions who accepted Federal contracts should be bound by the contracted obligations. The argument, again, misses the mark. The equal opportunity clause (and by reference all applicable regulations) was presumably included in each contract required to include it. See 41 C.F.R. §§ 60-1.4(a) and 60-1.5(a)(1); 41 C.F.R. §§ 60-250.3(a)(1) and 60-250.4; 41 C.F.R. §§ 60-741.3(a)(1) and 60-741.4. If it was not, it would have been incorporated by operation of law. 41 C.F.R. § 60-1.4(e); 41 C.F.R. § 60-250.23; 41 C.F.R. § 60-741.23. Thus, there could have been no doubt or lack of knowledge on the part of the contractor, the University of North Carolina, of the terms of the contracts.

Similarly, the exemption in 41 C.F.R. § 60-1.5(a)(4) for "any agency, instrumentality or subdivision of [state] government which does not participate in work on or under the contract. . . ." does not exempt UNC-A or NCSA because, as discussed above, they are not separate state agencies. This exemption applies only to agencies constituted as separate and distinct from the agency holding the contract, for example, the North Carolina Department of Human Resources. See N.C. Gen. Stat. Chapter 143B, Art. 3, §§ 143B-136, 143B-137 (1983).

UNC cites a number of state and federal cases which it asserts specifically held that the constituent institutions of UNC are agencies of the State of North Carolina. Even if those cases so hold, I agree with ALJ Clarke that none of those cases decided the specific issue involved here, whether each constituent institution of UNC is a separate, independent state agency.

One case, which UNC does not address, dealt with a related issue and strongly supports the conclusion that UNC and its constituent institutions are a single state agency. The Supreme Court of North Carolina held in ***Student Bar Association Board of Governors, of the School of Law, University of North Carolina at Chapel Hill v. Byrd***, 293 N.C. 594, 239 S.E. 2d 415 (1977) (***Student Bar v. Byrd***), that the North Carolina Open Meeting Law does not apply to meetings of the faculty of the School of Law of the University of North Carolina at Chapel Hill. The Open Meeting Law only applies to "bodies politic" which are both "governing" and "governmental" bodies. 293 S.E. 2d at 420. The court went on to define "governing body."

> [T]he "governing body" of an institution . . . means the body which has the ultimate power to determine its policies and control its activities. Such body may delegate to an employee or group of employees authority to make, initially, such decisions, but such employee or group of employees is not the "governing body" so long as his or its determinations are subject to review and reversal by the higher authority, by whose permission such determination is made.

Id. at 421.

The court noted that N.C. Gen. Stat. § 116-11(2) vests in the Board of Governors the powers of control, supervision, management and governance of all the affairs of all of the sixteen constituent institutions of UNC, including UNC-CH.

Therefore,

> [t]he faculty of the School of law are employees of the Board of Governors, authorized by that Board to make certain determinations with reference to the day-to-day operation of the School of Law, but all such determinations by the faculty are subject to the power of the Board of Governors to modify or reverse them. The fact that such power is rarely used . . . does not abrogate it. Thus, the faculty of the School of Law is not the "governing body" of the School of Law. The "governing body" is the Board of Governors.

Id.

It is clear, under the state law and regulations discussed above, that the Chancellor and administrative officers of each constituent institution of UNC are employees of the Board of Governors, just as the faculty are, and subject to its direction and control. Each constituent institution therefore cannot be a separate, independent agency.

The North Carolina Supreme Court also noted in ***Student Bar v. Byrd*** that disclosure of information about individual students by opening Law School faculty meetings to the public could well result in the cutoff of federal education grant funds to the entire University, including all its constituent institutions, under the Family Educational Rights and Privacy Act (the Buckley Amendment to the General Education Provisions Act, 20 U.S.C. § 1232g(b)(1) (1982). 239 S.E.2d at 419. That result could follow only if UNC were a single agency, because the Buckley Amendment provides that "[n]o funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of educational records . . . of students without the written consent of their parents . . . ." 20 U.S.C. § 1232g(b)(1) (emphasis added). If each constituent institution of UNC were a separate, independent agency, violation

of the Buckley Amendment by the School of Law at UNC-CH could lead only to a fund cut-off for UNC-CH, not the entire University.

Finally, Defendant asserts that the provisions of 42 C.F.R. § 60-1.5(a)(4), 41 C.F.R. § 60-250.3(a)(4), and 41 C.F.R. § 60-741.3(a)(4) which are entitled "Exemptions" or "Waivers", are not exemptions at all, but only explain and define the scope of Executive Order No. 11,246 and Sections 503 and 402, flowing directly from their language. The Secretary does not have the authority, UNC contends, to exempt any person who is a contractor, and also does not have the power to apply the three laws to separate state agencies which are not contractors. But here again, it is circular to assert that the obligations of the contracting state agency (i.e., under UNC's argument, certain constituent institutions) may not be imposed under the regulations on other state agencies (UNC-A and NCSA), when the issue to be decided is whether UNC-A and NCSA are separate agencies. I hold that under North Carolina General Statutes 116, Article 1, and ***Student Bar v. Byrd***, the University of North Carolina at Asheville and the North Carolina School of the Arts are not separate agencies and are not entitled to the exemption in 41 C.F.R. §§ 60-1.5(a)(4), 60-250.3(a)(4), and 60-741.3(a)(4). I make this finding based upon full review and consideration of the record pursuant to 41 C.F.R. §§ 60-30.29, 60-30.30.

Accordingly, Defendant's exceptions are denied. I adopt the ALJ's recommended order, slightly modified, as follows:

It is ORDERED that Defendant, its officers, agents, successors and constituent institutions including the North Carolina School of the Arts and the University of North Carolina-Asheville

are enjoined and restrained from violation of Executive Order No. 11,246, the Rehabilitation Act of 1973, 29 U.S.C. § 793 (1982), and the Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. § 2012 (1982) (hereinafter E.O. 11,246, Rehabilitation Act, and Vietnam Era Veterans Act respectively) in any of the following manners:

1. The University of North Carolina-Asheville and North Carolina School of the Arts shall not refuse Plaintiff access to their premises, books, records, and accounts for purposes of conducting compliance reviews pursuant to E.O. 11,246, the Rehabilitation Act and Vietnam Era Veterans Act.

2. No facility or constituent institution of Defendant shall unlawfully refuse Plaintiff access to its premises, books, records, and accounts for purposes of conducting compliance reviews pursuant to E.O. 11,246, the Rehabilitation Act and the Vietnam Era Veterans Act.

3. No facility or constituent institution of Defendant shall fail to maintain affirmative action programs which comply with E.O. 11,246, the Rehabilitation Act, and the Vietnam Era Veterans Act and with the regulations promulgated respectively thereto.

IT IS FURTHER ORDERED that, should Defendant fail to comply with the above-stated Order within 90 days of the date of this order, all Federal contracts and subcontracts by Defendant (whether in its own name or in the names of its constituent

institutions) shall be cancelled and Defendant, its officers, successors and constituent institutions shall be declared ineligible for the award of any contract or subcontract or the extension or modification of any contract or subcontract funded in whole or in part by the United States until Defendant has satisfied the Secretary that Defendant is in compliance with the provisions of E.O. 11,246, the Rehabilitation Act, and the Vietnam Era Veterans Act and all rules, regulations and orders issued respectively thereunder which have been found to have been violated in this case.

SO ORDERED.

Dennis E. Whitfield
Acting Secretary of Labor

Washington, D.C.

# APPENDIX F

## 29 U.S.C. § 793. Employment under Federal contracts

(a) Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

# APPENDIX G

38 U.S.C. § 2012. Veterans' employment emphasis under Federal contracts

(a) Any contract in the amount of $10,000 or more entered into by any department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era. The provisions of this section shall apply to any subcontract entered into by a prime contractor in carrying out any contract for the procurement of personal property and non-personal services (including construction) for the United States. In addition to requiring affirmative action to employ such veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the President shall implement the provisions of this section by promulgating regulations which shall require that (1) each such contractor undertake in such contract to list immediately with the appropriate local employment service office all of its suitable employment openings, and (2) each such local office shall give such veterans priority in referral to such employment openings.

# APPENDIX H

## EXECUTIVE ORDER 11246

### "Part II--Nondiscrimination in Employment by Government Contractors and Subcontractors

### "Subpart B--Contractors' Agreements

"Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or

other contact or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965 [this note], and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965 [this note], and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

"(6) In the event of the contractor's noncompliance with the non-discrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965 [this note], and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 2965 [this note], or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each sub-contractor or vendor. The contractor will take such action with

respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: **Provided, however**, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

# APPENDIX I

## 41 C.F.R. § 60-1.3

§ 60-1.3 Definitions.

"Contract" means any Government contract or any federally assisted construction contract.

"Contractor" means, unless otherwise indicated, a prime contractor or subcontractor.

"Government Contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. The term "services", as used in this section includes, but is not limited to the following services: Utility, construction, transportation, research, insurance, and fund depository. The term "Government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally assisted construction contracts.

"Person" means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

"Prime contractor" means any person holding a contract and, for the purposes of Subpart B of this part, any person who has held a contract subject to the order.

# APPENDIX J

## 41 C.F.R. § 60-1.5(a)(4)

§ 60-1.5 Exemptions.

(a) General--

(4)Contracts with State or local governments. The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract. In addition, any agency, instrumentality or subdivision of such government, except for educational institutions and medical facilities, are exempt from the requirements of filing the annual compliance report provided for by § 60-1.7(a)(1) and maintaining a written affirmative action compliance program prescribed by § 60-1.40 and Part 60-2 of this chapter.

# APPENDIX K

## N.C. GEN. STAT. §§ 116-3, 116-4, 116-11(2), 116-11(5) 116-11(13), 116-33 and 116-34

§ 116-3. **Incorporation and corporate powers.**

The Board of Trustees of the University of North Carolina is hereby redesignated, effective July 1, 1972, as the "Board of Governors of the University of North Carolina." The Board of Governors of the University of North Carolina shall be known and distinguished by the name of "the University of North Carolina" and shall continue as a body politic and corporate and by that name shall have perpetual succession and a common seal. It shall be able and capable in law to take, demand, receive, and possess all moneys, goods, and chattels that shall be given for the use of the University, and to apply to same according to the will of the donors; and by gift, purchase, or devise to receive, possess, enjoy, and retain forever any and all real and personal estate and funds, of whatsoever kind, nature, or quality the same may be, in special trust and confidence that the same, or the profits thereof, shall be applied to and for the use and purpose of establishing and endowing the University, and shall have power to receive donations from any source whatever, to be exclusively devoted to the purposes of the maintenance of the University, or according to the terms of donation.

The corporation shall be able and capable in law to bargain, sell, grant, alien, or dispose of and convey and assure to the purchasers any and all such real and personal estate and funds as it may lawfully acquire when the condition of the grant to it or the will of the devisor does not forbid it; and shall be able and capable in law to sue and be sued in all courts whatsoever; and shall have power to open and receive subscriptions, and in general may do all such things as are usually done by bodies corporate

and politic, or such as may be necessary for the promotion of learning and virtue.

§116-4. **Constituent institutions of the University of North Carolina.**

On July 1, 1972, the University of North Carolina shall be composed of the following institutions: the University of North Carolina at Chapel Hill, North Carolina State University at Raleigh, the University of North Carolina at Greensboro, the University of North Carolina at Charlotte, the University of North Carolina at Asheville, the University of North Carolina at Wilmington, Appalachian State University, East Carolina University, Elizabeth City State University, Fayetteville State University, North Carolina Agricultural and Technical State University, North Carolina Central University, North Carolina School of the Arts, Pembroke State University, Western Carolina University and Winston-Salem State University.

§ 116-11. **Powers and duties generally.**

The powers and duties of the Board of Governors shall include the following:

(2) The Board of Governors shall be responsible for the general determination, control, supervision, management and governance of all affairs of the constituent institutions. For this purpose the Board may adopt such policies and regulations as it may deem wise. Subject to applicable State law and to the terms and conditions of the instruments under which property is acquired, the Board of Governors may acquire, hold, convey or otherwise dispose of, invest and reinvest any and all real and personal property, with the exception of any property that may be held by trustees of institutional endowment funds under the provisions of G.S. 116-36 or that may be held, under authority

delegated by the Board of Governors, either by a board of trustees or by trustees of any other endowment or trust fund.

(5) The Board of Governors shall, on recommendation of the President and of the appropriate institutional chancellor, appoint and fix the compensation of all vice-chancellors, senior academic and administrative officers and persons having permanent tenure.

(13) The Board may delegate any part of its authority over the affairs of any institution to the board of trustees or, through the President, to the chancellor of the institution in any case where such delegation appears necessary or prudent to enable the institution to function in a proper and expeditious manner. Any delegation of authority may be rescinded by the Board at any time in whole or in part.

§ 116-33. **Powers and duties of the boards of trustees.**

Each board of trustees shall promote the sound development of the institution within the functions prescribed for it, helping it to serve the State in a way that will complement the activities of the other institutions and aiding it to perform at a high level of excellence in every area of endeavor. Each board shall serve as advisor to the Board of Governors on matters pertaining to the institution and shall also serve as advisor to the chancellor concerning the management and development of the institution. The powers and duties of each board of trustees, not inconsistent with other provisions of this Article, shall be defined and delegated by the Board of Governors.

§ 116-34. **Duties of chancellor of institution.**

(a) The chancellor shall be the administrative and executive head of the institution and shall exercise complete executive authority therein, subject to the direction of the President. He shall be responsible for carrying out policies of the Board of Governors and of the board of trustees. As of June 30 of each year he shall prepare for the Board of Governors and for the board of trustees a detailed report on the operation of the institution for the preceding year.

(b) It shall be the duty of the chancellor to attend all meetings of the board of trustees and to be responsible for keeping the board of trustees fully informed on the operation of the institution and its needs.

(c) It shall be the duty of the chancellor to keep the President, and through him the Board of Governors, fully informed concerning the operations and needs of the institution. Upon request, he shall be available to confer with the President or with the Board of Governors concerning matters that pertain to the institution.

(d) Subject to policies prescribed by the Board of Governors and by the board of trustees, the chancellor shall make recommendations for the appointment of personnel within the institution and for the development of educational programs.

# APPENDIX L

## THE UNIVERSITY OF NORTH CAROLINA

### OFFICE OF THE PRESIDENT

### ADMINISTRATIVE MEMORANDUM

SUBJECT Grants, contracts, and Cooperative Agreements to Finance Sponsored Programs

NUMBER 68
DATE September 22, 1976
(Revised October 1, 1980)

1. Purpose. This memorandum establishes procedures with respect to grants, contracts, and cooperative agreements - as defined in P.L. 95-224, to finance sponsored programs within The University of North Carolina.

2. Definitions. Sponsored programs are identified by two basic features: They are separately financed in whole or in part by external agencies, and they are carried out under the terms of agreements between The University, its constituent institutions, and the sponsoring agencies. Grants, contracts, and cooperative agreements, the devices for authorizing sponsored programs, although usually associated with specific individuals, are awarded to The University or to a constituent institution. Sponsored programs do not include individual consulting relationships. "Cooperative Agreement" does not include those cooperative arrangements between the United States Department of Agriculture and University Agricultural research

personnel to carry out programs of joint interest where no solicitations of funds from the federal agency is made.

3. Policies.

a. All sponsored programs which are carried out by constituent institutions or other agencies of The University or on University-controlled premises by or under the direction of faculty or staff members of constituent institutions or other agencies of The University, shall be subject to review and approval with respect to funding arrangements by the President of The University of North Carolina or by the Chancellor or other persons who have been specifically designated by the President.

b. All formal applications to donors and sponsors for support of sponsored programs, with the exceptions noted hereinafter, shall be submitted to donors and sponsors through the President and reviewed under such instructions and guidelines as the President may deem necessary. Current instructions and guidelines are set forth in paragraphs 4 through 6 below. These procedures may be modified by the President as experience and need may warrant. Separate, specific instructions and guidelines may be adopted and issued as necessary for various types of programs, e.g. research, training, institutional development, or facilities programs. In the review of proposals for sponsored research, the President may seek the advice of The University Council on Research with respect to policies and standards. The President may establish such other councils or other

special advisory committees as he may deem necessary for the review of sponsored programs, and he may use outside consultants to assist in reviews and evaluations.

4. General Criteria. The general criteria that must be considered in the development of applications for grants, contracts, and cooperative agreements are:

   a. Adequate budgetary support, both direct and indirect, is to be provided by the funding agency and other appropriate sources, and no unauthorized obligations are to be assumed by the institution.

   b. All sponsored programs and projects must be compatible with the overall mission of The University and of the constituent institution or institutions involved.

   c. Projects and proposals must be consistent with all pertinent University policies and regulations.

5. Procedures for Review and Approval.

   a. Submission Standards. Applications for grants, contracts, and cooperative agreements may be submitted by the Chancellor or his designated representative as approved in advance by the President directly to a funding authority, without prior approval by the President, with the following exceptions:

      (1) Those under which The University or the institution assumes an express or implied respon-

sibility to continue the program or activity beyond the life of the grant or to retain personnel initially employed under the grant, contract, or cooperative agreement.

(2) Those involving the creation of a new organizational unit (a department, center, institute, school, etc.) within The University or a constituent institution.

(3) Those involving the planning or establishment of a new degree program or program track.

(4) Those requiring matching funds or contributions that cannot be provided from current institutional resource levels.

(5) Those which would impede the elimination of racial duality in The University.

b. Applications Not Requiring Prior Approval of the President.

(1) Upon a determination by the Chancellor or his designated representative as approved in advance by the President that prior approval of the President is not required, the application may be forwarded directly to the funding authority by the institution.

(2) The transmittal of the application to the funding authority will include the following notation:

An abstract of this (application or proposal) has been provided the President of The University of North Carolina.

(3) One copy of the Report of Application for Grant, Contract, or Cooperative Agreement (Attachment A), an abstract of the application (Attachment B), and the Internal Processing Form (Attachment C) will be forwarded to the President of The University promptly following the transmittal of the application to the funding authority. In the submission, Attachment A should be on top, followed by B and C, in that order.

(4) The President may at any time direct the withdrawal, revision, or amendment of an application or proposal forwarded under the provisions of this subparagraph.

c. Applications Requiring Prior Approval of the President.

(1) Upon determination by the Chancellor or his designated representative that prior approval of the President is required, a copy of the proposal (which will remain on file with General Administration), the Internal Processing Form, the Request for Approval of Application for Grant, Contract, or Cooperative Agreement (Attachment D), and the abstract of the application will be forwarded to the

President by the Chancellor or his designated representative as approved by the President.

(2) Applications normally will be forwarded to the President at least two weeks in advance of the filing date established by the funding authority. Because of their greater degree of complexity, proposals under Title III (Developing Institutions) of the Higher Education Act of 1965 shall be submitted four weeks in advance of the filing date. In those instances in which the assumption is that the President's review will be particularly extensive, preliminary discussions should be initiated by the Chancellor earlier than indicated above.

(3) The Chancellor normally will be provided the President's response to the application within one week of the date of receipt of the application. A signed copy of the Request for Approval will be returned to the Chancellor, and the Chancellor will then transmit the approved proposal or application to the funding agency.

d. Report of Action by Funding Agencies. Each institution shall submit a Monthly Report of Awards and Rejections (Attachment E) not later than the fifteenth of the month following that in which the activity occurs. This form shall be used to report all grant, contract, and cooperative agreement awards and all proposal rejections.

6. Standard Forms and Records. Certain standard forms and procedures will be used in the preparation and review of applications for grants, contracts, and

cooperative agreements, and for maintaining records and reporting on such sponsored programs.

a. Report of Application for Grant, Contract, or Cooperative Agreement (Attachment A). This form provides a standard method of reporting individual applications to the President at the time of submission to funding agencies. It will be used as the primary reference in identifying each project not requiring the approval of the President and for reporting to such external organizations as the State A-95 Clearinghouse. This form also will be used for classifying projects for communication and reporting purposes.

b. Abstract of Application for Grant, Contract, or Cooperative Agreement (Attachment B). The abstract of each application provides summary information required for communications with various persons or organizations needing limited information on applications pending or funded.

c. Internal Processing Form - Application for Grant, Contract, or Cooperative Agreement (Attachment C). The basic purpose of this form is to ensure that all of the critical elements of concern to The University have been reviewed by the appropriate administrative officers. The form will be signed by the Principal Investigator or Project Director. Other endorsements may vary, but the signatures of approval indicating the reviews of the Chancellor and the chief finance officer of the institution, or their designated representatives as approved in

advance by the President, are required in all instances.

d. Request for Approval of Application for Grant, Contract or Cooperative Agreement (Attachment D). This form provides a standard method of requesting the President's approval of applications and for notifying the Chancellor of the President's action. It will be used as the primary reference in identifying each project requiring the approval of the President and for reporting to such external agencies as the State A-95 Clearinghouse. This form also is used for classification of the project for communications and reporting purposes.

e. Monthly Report of Awards and Rejections (Attachment E). This form has been designed primarily in response to State A-95 Clearinghouse requirements. It is keyed to Attachments A and D and to a standardized filing system for all proposals or applications.

f. Filing System. Each institution will maintain a filing system which numbers each application with the institutional Federal Interchanges Committee on Education (FICE) code, the last two digits of the State's fiscal year (July 1-June 30), and the chronological number. The first application in fiscal year 1980-81 from Fayetteville State University, for example, will be designated as 002928-81-0001. Requests for annual budget

allotments to multi-year projects will carry the number of the original project.

g. Classification System. On Attachments A and D, sponsored research and training activities will be classified according to the Taxonomy of Academic Disciplines (Attachment F), and the Smithsonian Institution taxonomy of research in process (Attachment G). Project categories will be classified according to The University of North Carolina Chart of Accounts purpose codes (Attachment H).

7. Effective Date. Effective January 1, 1981, applications for grants, contracts, cooperative agreements, and related correspondence will be processed as prescribed herein.

This memorandum supersedes all earlier instruction issued by this office on the same subject.

William Friday, President

Attachment: A-H

(2)

No. 90-1287

Supreme Court, U.S.
FILED
APR 16 1991
OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1990

---

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, ET AL., PETITIONERS

*v.*

UNITED STATES DEPARTMENT OF LABOR, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

---

KENNETH W. STARR
*Solicitor General*

JOHN R. DUNNE
*Assistant Attorney General*

DAVID K. FLYNN
IRVING GORNSTEIN
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

BEST AVAILABLE COPY

## QUESTION PRESENTED

Whether the University of North Carolina is subject to institution-wide coverage under Executive Order No. 11,246, Section 503 of the Rehabilitation Act, 29 U.S.C. 793, and the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. 2012, by virtue of federal contracts held by some but not all of its 16 campus components.

TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 11 |


TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988) | 8 |
| *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) | 8 |
| *California* v. *Taylor*, 353 U.S. 553 (1957) | 10 |
| *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) | 10 |
| *Ford* v. *Williams*, 62 U.S. (21 How.) 287 (1858) | 8 |
| *Grove City College* v. *Bell*, 465 U.S. 555 (1984) | 10, 11 |
| *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150 (1983) | 10 |
| *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981) | 9 |
| *Student Bar Ass'n* v. *Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977) | 8 |
| *United States* v. *California*, 297 U.S. 175 (1936) | 10 |
| *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988) | 8 |


Statutes and regulations:


| | |
|---|---|
| Administrative Procedure Act, 5 U.S.C. 706 | 4 |
| Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) | 11 |
| Rehabilitation Act, § 503, 29 U.S.C. 793 | 3, 6 |
| Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. 2012 | 3, 6 |

Statutes and regulations—Continued: Page

N.C. Gen. Stat. (1987):
§ 116-3 ..... 2
§ 116-4 ..... 2
§ 116-11 ..... 2
§ 116-11(13) ..... 2
§ 116-14 ..... 2
§ 116-33 ..... 2
§ 116-34 ..... 2
Exec. Order No. 11,246, 3 C.F.R. 167 (Supp. 1965) ..... 3, 6
41 C.F.R.:
Section 60-1.3 ..... 6
Section 60-1.5(a)(4) ..... 5, 6
Section 60-250.2 ..... 6
Section 60-250.3(a)(4) ..... 6
Section 60-741.2 ..... 6
Section 60-741.3(a)(4) ..... 7

Miscellaneous:
Restatement (Second) of Agency (1958) ..... 8
S. Rep. No. 64, 100th Cong., 1st Sess. (1987) ..... 11

# In the Supreme Court of the United States

OCTOBER TERM, 1990

---

No. 90-1287

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, ET AL., PETITIONERS

*v.*

UNITED STATES DEPARTMENT OF LABOR, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-16A) is reported at 917 F.2d 812. The opinion of the district court (Pet. App. 22A-38A) is reported at 722 F. Supp. 1301. The opinion of the Acting Secretary of Labor (Pet. App. 41A-52A) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 26, 1990. A petition for rehearing was denied on December 19, 1990 (Pet. App. 17A-19A). The petition for a writ of certiorari was filed on

February 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner Board of Governors of the University of North Carolina (UNC) is "known and distinguished by the name of 'the University of North Carolina'" and is a "body politic and corporate." N.C. Gen. Stat. § 116-3 (1987). It is composed of 16 "constituent institutions" or campuses, including petitioners University of North Carolina at Asheville and the North Carolina School of the Arts. *Id.* § 116.4. The UNC Board of Governors is responsible for "the general determination, control, supervision, management and governance of all affairs of the constituent institutions." *Id.* § 116-11. As part of this responsibility, the Board determines the academic mission, the enrollment level, and the tuition at each campus; it appoints each campus's senior administrative staff and tenured faculty; and it prepares one budget for the entire university system. *Ibid.* The Board also selects the President of UNC, who is its "chief administrative officer." *Id.* § 116-14.

Each UNC campus has a board of trustees and a chancellor. The board of trustees of each campus has only those powers delegated to it by the Board of Governors. N.C. Gen. Stat. § 116-33 (1987). Similarly, the chancellor of each campus exercises executive authority over the campus "subject to the direction of the President." *Id.* § 116-34. The Board of Governors may delegate "any part of its authority over the affairs of any [constituent] institution to the board of trustees or, through the President, to the chancellor." *Id.* § 116-11(13). A delegation by

the Board "may be rescinded by the Board at any time in whole or in part." *Ibid.*

In accordance with this statutory framework, the President of UNC has established procedures that campuses must follow when they apply for federal contracts. Pet. App. 4A-5A. Under those procedures, the President must approve in advance any contract proposal that falls into one of five specified categories. *Id.* at 4A & n.1. Other proposals may be submitted to a federal contracting agency without the President's prior approval. *Id.* at 5A. In such cases, however, the campus must send a copy of the proposal to the President, who may at any time direct its withdrawal, revision, or amendment. *Ibid.* Acting under these procedures, 11 of the 16 UNC campuses have entered into contracts with federal agencies. *Ibid.* Petitioners University of North Carolina at Asheville and North Carolina School of the Arts are two of the campuses that have not. *Ibid.*

2. Executive Order No. 11,246, as amended, prohibits a federal "contractor" from discriminating in its hiring practices on the basis of race, color, religion, sex, or national origin. 3 C.F.R. 167 (Supp. 1965). The Order also requires the contractor to take "affirmative action" to ensure equal employment opportunity for members of these protected groups. *Ibid.* Section 503 of the Rehabilitation Act, 29 U.S.C. 793, and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), 38 U.S.C. 2012, require a "party contracting with the United States" to take similar affirmative steps on behalf of the handicapped and certain categories of veterans. These laws are collectively known as the "contract compliance laws."

The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor is re-

sponsible for enforcing the contract compliance laws. Pet. App. 6A. To ensure compliance, OFCCP conducts periodic reviews at the facilities of federal contractors. *Ibid.*

3. In 1981, OFCCP initiated a compliance review at the University of North Carolina at Asheville and at the North Carolina School of the Arts. Pet. App. 6A. When petitioners refused to cooperate with the investigations, OFCCP filed an administrative complaint against them. *Ibid.* Petitioners contended that they were not federal contractors because they had not made any federal contracts in their own names. *Ibid.*

The Acting Secretary of Labor rejected this contention and ordered petitioners to allow OFCCP to conduct its compliance reviews. Pet. App. 41A-52A. The Acting Secretary determined that, under state law, the University of North Carolina and its 16 campuses constitute a single state agency. He accordingly held that, when UNC campuses are awarded contracts, UNC is properly viewed as the "contractor" for purposes of the federal contract compliance laws, and therefore all of its campuses must comply with those laws. *Id.* at 43A-47A. The Acting Secretary rejected the notion that the campuses were converted into independent contractors when UNC delegated to them the authority to contract in their own names. He explained that, under state law, campuses contract only as agents of UNC; state law confers the power to contract on UNC, not on its constituent campuses. *Id.* at 46A-47A.

4. Petitioners sued in the United States District Court for the Eastern District of North Carolina, seeking review of the Acting Secretary's order under the Administrative Procedure Act, 5 U.S.C. 706. The

district court set aside the order, finding that it was "not in accordance with law" (*ibid.*). The court determined that only entities that have signed contracts in their own names are subject to coverage under the federal contract compliance laws. Since petitioners had not made any contracts in their own names, the court concluded, they are not covered by the contract compliance laws. Pet. App. 33A-36A.

5. The Fourth Circuit reversed. Pet. App. 1A-16A. It agreed with the Acting Secretary that, under North Carolina law, the University of North Carolina is one state agency and not sixteen separate agencies, and therefore may be treated as a single contractor for purposes of the contract compliance laws. *Id.* at 9A. The court held that, "[i]n ruling that the campuses that had entered federal contracts had done so as agents of UNC, the Acting Secretary merely stated what clearly appears from an examination of the relevant North Carolina statutes." *Id.* at 12A-13A.[1]

Judge Widener dissented, essentially adopting the district court's reasoning. Pet. App. 14A-16A.

---

[1] The court of appeals rejected petitioners' argument that they were exempt from the contract compliance laws under regulations providing that those laws "shall not be applicable to any agency, instrumentality or subdivision of [state] government which does not participate in work on or under the contract or subcontract." Pet. App. 12A (quoting 41 C.F.R. 60-1.5(a)(4)). The court explained that these regulations "do[] not operate to exempt the non-contracting campuses of UNC because the state statutory scheme constitutes them as mere components of UNC, rather than as an 'agency, instrumentality, or subdivision of [state] government' that is independent of UNC." *Ibid.* (bracketed text supplied by court of appeals).

## ARGUMENT

The court of appeals held that the University of North Carolina is subject to institution-wide coverage under the federal contract compliance laws. That holding is firmly grounded in North Carolina law, and is consistent with the contract compliance laws and the Department of Labor's regulations. No conflict with the decision of any other court of appeals exists or is asserted to exist. Further review is therefore unwarranted.

1. For purposes of the contract compliance laws, Department of Labor regulations define a government contractor to include any "State or local government, and any agency, instrumentality, or subdivision of such a government." 41 C.F.R. 60-1.3 (Exec. Order No. 11,246), 60-250.2 (VEVRAA), and 60-741.2 (Section 503 of Rehabilitation Act). The Department of Labor construes these definitional regulations to mean that every *independent* unit of a state or local government has a distinct contracting identity but that *components* of such a unit do not. Pet. App. 47A, 50A. Accordingly, when the components of a state agency, instrumentality, or subdivision are awarded federal contracts, the entire agency, instrumentality, or subdivision is treated as the contractor. *Ibid.*

The Department of Labor's definitional regulations operate in tandem with a second set of regulations providing that "[t]he requirements of the equal opportunity clause * * * shall not be applicable to any agency, instrumentality or subdivision * * * which does not participate in work on or under the contract." 41 C.F.R. 60-1.5(a)(4) (Exec. Order No. 11,246), 60-250.3(a)(4) (VEVRAA regulation, which substitutes "affirmative action clause" for

"equal opportunity clause"), and 60-741-3(a)(4) (Rehabilitation Act regulation, also substituting "affirmative action clause" for "equal opportunity clause"). The Department of Labor construes these regulations to mean that the contract of one independent agency does not subject another independent agency to coverage, unless the latter performs contract work. Pet. App. 47A. As the court of appeals recognized (*id.* at 12A), because the components of a contracting agency do not fall within the terms of this second set of regulations, those components are subject to coverage whether or not they work on the contract. To decide whether a particular entity is an independent agency or is instead an agency component, the Department of Labor follows state law. *Id.* at 45A-47A.

Petitioners contend (Pet. 15-19) that, because the individual campuses are separate state agencies, only campuses that sign contracts or perform work under them are subject to coverage under Department of Labor regulations. But as the Fourth Circuit concluded after a comprehensive review of North Carolina law (Pet. App. 9A-11A), the individual campuses are *not* separate state agencies. Instead, they are simply components of petitioner UNC.[2] Accord-

[2] As detailed by the Fourth Circuit (Pet. App. 9A-11A), the state statutory scheme establishes UNC as a body politic and corporate; the campuses have no such status. UNC has the power to sue and be sued; the campuses do not. The statute describes UNC as being "composed of" the sixteen campuses and refers to the campuses as "constituent" parts of UNC. The statute gives UNC's Board of Governors complete authority to manage the affairs of the campuses; the campuses have only the authority that the Board of Governors delegates to them. Moreover, the North Carolina Supreme Court has described UNC as a single governmental

ingly, under the regulations issued by the Department of Labor, when contracts are awarded to UNC campuses, UNC is the relevant contracting "agency" and all of its constituent campuses are subject to the coverage of the contract compliance laws. The issue of state law underpinning that conclusion does not warrant review by this Court. *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).

2. Petitioners argue (Pet. 9-15) that the court of appeals' holding is inconsistent with the language in the contract compliance laws that imposes obligations on the "contractor" and the "party contracting with the United States." According to petitioners (Pet. 12), the term "contractor" can mean only one thing: the person named in the contract. The meaning of the term "contractor," however, is not so limited. That term can also refer to the party with ultimate control over the person named in the contract. For example, when a contract is made in the name of an agent, the principal is considered the "contractor." *Ford* v. *Williams*, 62 U.S. (21 How.) 287 (1858); Restatement (Second) of Agency §§ 149, 186, 190 (1958).

The Fourth Circuit correctly concluded (Pet. App. 9A-10A) that under North Carolina law the present situation is analogous to that of an agent contracting on behalf of a principal. Under the state statutory scheme, UNC has complete control over the affairs of the constituent campuses. Accordingly, when UNC delegates authority to its campuses to contract, and

---

entity. See Pet. App. 10A-11A (discussing *Student Bar Ass'n* v. *Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977)).

the campuses act pursuant to that delegation, the campuses necessarily contract on behalf of UNC and are subject to UNC's continuing control. As the court of appeals stated (*id.* at 12A-13A), "[i]n ruling that the campuses that had entered federal contracts had done so as agents of UNC, the Acting Secretary merely stated what clearly appears from an examination of the relevant North Carolina statutes."[3] As the Fourth Circuit concluded, UNC is therefore the "contractor," even though the contracts were signed by individual campuses.[4]

3. Finally, petitioners argue (Pet. 19-25) that the Fourth Circuit's decision conflicts with the principle that Congress and the Executive Branch must speak clearly when they wish to impose conditions on the States. That argument is without merit. The contract compliance laws clearly make "affirmative action" a mandatory requirement; there can be no claim that these laws are merely precatory. Cf. *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 19 (1981). Moreover, the contract compliance laws extend this requirement to all government contractors

---

[3] Petitioners criticize the Department of Labor's reliance on state law, asserting (Pet. 24) that it will produce anomalous results. That criticism is misguided. Under petitioners' own interpretation, state law will determine what entity is named in the contract and, therefore, what portion of a State's operations is subject to the contract compliance laws. Petitioners' criticism thus provides no basis for preferring their interpretation to the Department of Labor's.

[4] Petitioners contend (Pet. 22-24) that the agency analogy is imperfect since UNC and its campuses have not expressly agreed that the campuses would contract as agents of UNC. Because the state statutory scheme itself creates the agency relationship, however, there is no need for an express agreement.

without exception. Accordingly, when a state agency contracts with a federal agency, it is clearly subject to the obligations imposed by these laws. See *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 155-157 (1983); *California* v. *Taylor*, 353 U.S. 553 (1957); *United States* v. *California*, 297 U.S. 175 (1936).

To be sure, the language of these laws does not definitively resolve the precise question presented here: whether the relevant "contractor" in this setting is the entire university system or only the specific campuses awarded contracts. But as we have seen, the State's own legal scheme indicates that UNC is the contractor by virtue of its right to control the contracting process. In any event, statutory language cannot eliminate all uncertainty in how laws will be applied. Once it is clear that States are subject to a statutory command, those charged with enforcing the laws have discretion to resolve issues of application. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Here, the Department of Labor's regulations, together with general principles of agency law, gave UNC sufficient reason to anticipate that its campuses' contracts entered into by its campuses would subject the entire university system to the coverage of the contract compliance laws. This Court's decisions require no more.[5]

---

[5] There is no inconsistency between the court of appeals' decision and this Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, this Court held that the nondiscrimination obligations in the federal financial assistance statutes extend only to the specific programs in a university system that are federally assisted. That holding turned on the "program or activity" language in those stat-

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

JOHN R. DUNNE
*Assistant Attorney General*

DAVID K. FLYNN
IRVING GORNSTEIN
*Attorneys*

APRIL 1991

utes. *Grove City*, 465 U.S. at 570-574. No corresponding language appears in the contract compliance laws. After this Court's decision in *Grove City*, Congress amended the federal financial assistance statutes to extend their nondiscrimination requirements to an entire university system when any part of it receives assistance. Pub. L. No. 100-259, 102 Stat. 28 (1988). See also S. Rep. No. 64, 100th Cong., 1st Sess. 4 (1987).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20493